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Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

AMERICAN FAMILY
MUTUAL INSURANCE COMPANY,

Petitioner,

v.

NICHOLAS H. SMITH, AMY AND BRYCE JOHNSON,
On Behalf of Themselves and All Others Similarly Situated,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a defendant's due process rights under the Fourteenth Amendment of the United States Constitution violated when a trial court orders class notice to approximately 24,000 non-class members in an opt-out state class action and thereby forces the defendant to litigate against these non-class members, given that: (1) it is undisputed that these non-class members are identifiable; and (2) it is undisputed that these non-class members have no justiciable claim against the defendant?

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, petitioner American Family Mutual Insurance Company filed a petition for writ of prohibition or mandamus with the Missouri Court of Appeals and Missouri Supreme Court relating to this action, in which it named the Honorable Edith L. Messina, Judge of the 16th Judicial District, Circuit Court of Jackson County, Missouri, as the respondent.

Corporate Disclosure Statement. Petitioner American Family Mutual Insurance Company, pursuant to Supreme Court Rule 14.1(b) and 29.6, states that no parent or publicly held company owns 10% or more of the corporation's stock.

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The Missouri Supreme Court's unreported order is reprinted at Pet. App. 1a. The Missouri Court of Appeals' unreported order is reprinted at Pet. App. 3a. The Missouri Circuit Court for Jackson County's unreported orders are reprinted at Pet. App. 4a, 7a, 20a and 23a.

BASIS FOR JURISDICTION

Procedural History Related to Jurisdiction

On November 5, 2004, petitioner American Family Mutual Insurance Company filed a motion with the Missouri Circuit Court for Jackson County, arguing that authorizing overinclusive opt-out class notice to some 24,000 identifiable non-class members who, everyone agrees, have no justiciable claim against American Family violated "the Due Process Clause of the United States Constitution." Pet. App. 55a; *see also id.* at 61a-66a. On February 24, 2005, the trial court denied American Family's motion. *Id.* at 7a-8a, ¶ 2. (American Family made this same due process argument to the trial court on several occasions. *See infra* pp. 8-10.)

On May 6, 2005, American Family petitioned the Missouri Court of Appeals for a writ of prohibition or mandamus, contending that the trial court's overinclusive notice to some 24,000 identifiable non-class members who have no justiciable claim violated "the due process clause under the Fourteenth Amendment to the United States Constitution." *Id.* at 45a; *see also id.* at 42a-46a. On May 25, 2005, the Missouri Court of Appeals denied American Family's petition. *Id.* at 3a; *State ex rel. American Family Mut. Ins. Co. v. Messina*, No. WD-65420 (Mo. Ct. App. May 12, 2004) (unpublished).

On May 26, 2005, American Family petitioned the Missouri Supreme Court for a writ of prohibition or mandamus, arguing again that the trial court's overinclusive notice to some 24,000 identifiable non-class members who have no justiciable claim violated "the due process clause of the U.S. Constitution." Pet. App. at 31a; *see also id.* at 31a-38a. On June 3, 2005, the Missouri Supreme Court denied American Family's petition. *Id.* at 1a-2a; *State ex rel. American Family Mut. Ins. Co. v. Messina*, No. SC-86864 (Mo. June 3, 2005) (unpublished).

Statutory Basis for Jurisdiction

Because the Missouri Supreme Court rendered a final decision on the due process claim at issue in this petition on June 3, 2005, Pet. App. at 1a-2a, the U.S. Supreme Court has jurisdiction to review the matter. *See* 28 U.S.C. § 1257(a) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any right . . . is . . . claimed under the Constitution . . . .").

The underlying state class action raises claims of breach of contract only and the constitutional question at issue in this petition is a matter separable and collateral from the underlying litigation. Indeed, it is the trial court's order authorizing overinclusive notice that gives rise to the petition, not the claims in the underlying lawsuit. Therefore, even though further proceedings are pending in state court on the underlying breach of contract claims, jurisdiction exists in this Court to review the due process issues raised in this petition. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 483 (1975) ("power of a state court to proceed in the face of the preemption claim was deemed an issue separable from the merits and ripe for review by this Court") (citing *Construction Laborers v. Curry*, 371 U.S. 542, 552 (1963)); *Mercantile National Bank v. Langdeau*,

371 U.S. 555, 558 (1963) (although trial on the merits was still pending, Supreme Court reviewed whether a federal statute immunized defendants from suit in a particular county, holding that the jurisdictional issue was a "separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising plaintiff's cause of action"); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 169-72 (1974) (holding that district court's imposition of 90% of the cost of class notice on defendant constituted a collateral and separable matter and, therefore, a final decision ripe for appellate review under 28 U.S.C. § 1291); *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1094, 1095 (5th Cir. 1977) (same).

The Supreme Court has described at least four categories of cases that are deemed final for purposes of Supreme Court review under § 1257 even when further proceedings in state court are anticipated. *Cox Broadcasting*, 420 U.S. at 477-87. As to these four categories, American Family fits neatly into at least two.

First, the Supreme Court held that a judgment is final for purposes of § 1257 if the state's highest court decides a federal issue on which the petitioning party cannot later seek review whatever the ultimate outcome of the case. *Id.* at 481. For example, if the party seeking review ultimately prevails on the merits, the federal issue will be mooted; if that party loses on the merits, state law would not permit that party to present his or her federal claim for review. *Id.* American Family fits squarely within this category. If American Family prevails on its state class action on the merits, its due process claim will be mooted by virtue of its victory. However, if American Family loses on the merits, the state court will not entertain its due process clam again. Indeed, the state court could never undue the due process violation and concomitant harm by virtue of the

fact that the trial court's order requires American Family to litigate against its own policyholders who, everyone agrees, have no justiciable claim or cognizable injury.

Second, the Court in *Cox Broadcasting* held that a judgment is deemed final under § 1257 when two things happen: (1) a federal claim has been decided by the state's highest court and the party seeking review might prevail on the merits on non-federal grounds, which would render review unnecessary on the federal issue; and (2) refusal to review the state court proceedings would seriously erode federal policy. *Id.* at 482-83. Again, if American Family prevails on the breach of contract claim, its due process claim would be moot. Moreover, if the U.S. Supreme Court vacates the trial court's order authorizing overinclusive notice, it would prevent American Family from litigating against non-class members. The trial court has acted outside its judicial and jurisdictional powers by allowing some 24,000 identifiable non-class members who have no justiciable claim to join a state class action. Allowing a state court to force a defendant to litigate against individuals with no justiciable claims, by definition, seriously erodes federal policy and contravenes notions of due process. Accordingly, American Family also fits within this category of cases deemed final for purposes of review under § 1257.

In *Cox Broadcasting* itself, the Supreme Court granted immediate review of a state court judgment that upheld the constitutionality of a statute authorizing suit against the press for publishing the name of a rape victim. The Court did so despite the fact that the state's highest court had remanded the case for trial on the merits. *Id.* at 485-86. This case is analogous to the facts in *Cox Broadcasting* in terms of finality. In another case, the Supreme Court treated a state court's order to quash service and vacate a sequestration order as final, holding that the defendant had only a choice between "suffering a default

judgment or entering a general appearance and defending on the merits." *Shaffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977); *see also New York v. Cathedral Academy*, 434 U.S. 125, 128 n.4 (1977) ("possible developments on remand" could not "remove or otherwise affect" the federal issue). Likewise, in this case, American Family has no choice because, as matters stand, it must defend on the merits against non-class members.

Finally, the Supreme Court has asserted § 1257 jurisdiction over state court judgments disposing of writs of prohibition in instances in which the jurisdiction of the state court is at issue. *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (deciding whether jurisdiction existed that would enable an Oklahoma court to hale the defendant into that forum after Oklahoma Supreme Court denied writ of prohibition on the issue); *Madruga v. Superior Court of Calif.*, 346 U.S. 556, 557 (1954) ("The San Diego court decided it had jurisdiction and was upheld by the State Supreme Court which declined to issue a writ of prohibition. . . . Certiorari was granted to consider the state court's jurisdiction.") (footnote omitted); *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 565-68 (1947) (same); *Bandini Petroleum Co. v. Superior Court of Los Angeles County*, 284 U.S. 8, 14-15 (1931) (same).

In sum, because the due process issue relevant to this petition is a matter separable and collateral from the underlying breach of contract action and because a state court does not have the judicial or jurisdictional power to allow identifiable non-class members to participate in this lawsuit, the Missouri Supreme Court's denial of American Family's petition for prohibition or mandamus is final for purposes of 28 U.S.C. § 1257. Accordingly, the Supreme Court has jurisdiction to review this petition.

RELEVANT PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

Rule 52.08(c)(2) of the Missouri Rules of Civil Procedure, which tracks Fed. R. Civ. P. 23(c)(2) almost verbatim, provides in part:

> In any class action maintained under Rule 52.08(b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

Mo. R. Civ. P. 52.08(c)(2).

STATEMENT OF THE CASE

On May 11, 2000, respondents filed the underlying state class action in the Circuit Court for Jackson County, Missouri. The underlying action is premised solely on breach of contract and concerns: (1) American Family's specification of aftermarket parts for repairing damages to policyholder vehicles; and (2) alleged systematic omissions of certain repairs. Respondents allege that aftermarket parts are "categorically inferior" to original equipment manufacturer (OEM) parts and that, by specifying the use of aftermarket parts in vehicle repair estimates, American Family breached its contractual obligation to restore a policyholder's vehicle to its pre-loss condition. Respondents allege further that American

Family breached its contractual duty by systematically omitting certain repair procedures from repair estimates.

On October 29, 2001, during the class certification hearing, respondents told the trial court that they would identify the class members by reviewing the hard-copy files:

> **Trial Court:** Okay, so is that what you're [respondents' counsel] proposing, that we . . . we get as many estimates as we can from American Family from the states included and from the class included and then have [respondents' expert] go down the estimates and say included, not included?
>
> **Respondents' Counsel:** We propose a method and it says, for example, it says just as we proposed, that the preliminary analysis can be made by [our expert] because he knows how to go about it. . . . if they [American Family] believe that the class, as put together, is wrong or if they believe our mailing list is wrong, they can challenge all of those things and it's, as I say, an audit function. . . . Your Honor, maybe I can clarify some of this, because some of the information is clearly kept on computer. And, obviously that's very helpful for determining, making that determination [identifying class members]. Beyond that, they [American Family] have it on hard copy -- they have literally the hard copy estimate. And, so together, you have it on computer, you have it on hard copy, that information can be downloaded into a database and that's put on a computer so that a determination can be made.

Pet. App. at 28a-29a; *see also id.* at 33a-34a.

On December 14, 2001, the trial court defined the class in the lawsuit as follows:

> All American Family insureds nationwide who, from or after May 11, 1990 until the date of this Order, made a claim for vehicle repairs pursuant to their policy and who received payment based on an estimate prepared or approved by American Family which included Non-OEM Crash Parts and/or did not include one or more Omitted Repairs, where the vehicle was not a total loss.

Id. at 24a (footnotes omitted). In that same order, the court held that, "Notice of the pendency of this action shall be provided to all members of the Class defined herein above who can be identified through reasonable efforts." *Id.* at 25a. The 24,000 non-class members at issue in this petition are those American Family policyholder-claimants whose vehicles were a total loss (i.e. total-loss claimants) that American Family could not identify electronically but, instead, requires respondents to review the hard-copy estimates as they promised to do during the class certification hearing.

On October 3, 2003, American Family objected to respondents' proposed notice, arguing that the notice was overinclusive on a number of fronts and, therefore, it violated the Due Process Clause of the U.S. Constitution because non-class members have no justiciable claim against American Family. *Id.* at 61a-66a.

On August 13, 2004, the trial court ordered that individual class notice be sent to class members, that is, policyholder-claimants who submitted claims for repairs *except* for those policyholder-claimants who were paid for total losses (total-loss claimants) or glass-only repairs. *Id.* at 20a-21a.

On November 5, 2004, American Family filed a motion with the trial court, contending that respondents' proposed notice included some 24,000 identifiable non-class members (i.e., total-loss claimants) who had no justiciable claim against American Family and, as a result, the notice violated the due process clause of the U.S. Constitution. *Id.* at 54a-59a.

On February 17, 2005, the trial court held a telephone conference in which respondents' counsel acknowledged that their proposed notice to approximately 465,000 individuals was overinclusive because it included some 24,000 non-class members (total-loss claimants). *Id.* at 11a-12a. Respondents no longer wanted to identify the class members because it involved reviewing the hard-copy estimates, *id.* at 11a, even though they had promised to do so during the class certification hearing held four years earlier. *Id.* at 28a-29a. The trial court also faulted American Family for failing to identify the class members. *Id.* at 17a ("I don't think the defendant in this instance has done anything to ferret those people out."). The court held that notice would be sent as proposed, "[u]nless the insurance company wants to go back and ferret these people out themselves, I – it -- I don't know what else the plaintiffs can do." *Id.* at 15a.

Although the court authorized overinclusive notice to be sent at the February 17 conference, it also questioned whether its assumption was correct that "plaintiffs will . . . as these things come in . . . ferret through them to make sure that only class members are in fact given access." *Id.* at 16a. To which respondents' counsel responded, "I think what Your Honor is referring to is at the end of the day, will class members be -- will only class members receive any distribution in the case?" *Id.* Respondents' counsel then agreed that only class members would be entitled to any distribution. *Id.*

On February 24, 2005, the trial court denied American Family's motion to preclude respondents from sending overinclusive class notice. *Id.* at 8a.

On February 25, 2005, American Family filed a supplemental response regarding notice as a result of the court's February 17 telephone conference, in which American Family contended that: (1) it would be "very detrimental to American Family and to class members if class notice were to be sent to almost 25,000 customers who, without dispute, are not members of the class"; and (2) "[c]lass notice carries with it the inescapable connotation of wrongdoing or liability and jeopardizes the goodwill and trust of its customers," which "becomes a club to force defendant into submission rather than a reasonable attempt to notify absent class members of pending litigation." *Id.* at 50a.

American Family also informed the trial court in its supplemental response that, given respondents' refusal to identify the actual class members and given the court's decision not to order respondents to do so, American Family was willing to perform the task of identifying the non-class members, while reserving its right to recoup the costs from respondents. *Id.* at 50a ("American Family will accept the Court's suggestion that it go through the loss estimates itself to cull out these non-class members before class notice is mailed."); *see also id.* at 51a.

On March 24, 2005, at a conference with counsel, the trial court denied American Family's proposal to perform the task of identifying the non-class members and ordered that notice be sent to the overinclusive group. *Id.* at 4a-6a. On March 28, 2005, the trial court issued an order confirming its oral rulings at the March 24 conference. *Id.*

On May 6, 2005, American Family petitioned the Missouri Court of Appeals for a writ of prohibition or mandamus, arguing that the trial court's order authorizing overinclusive notice to some 24,000 identifiable non-class members (the total-loss claimants) violated its due process rights under the Fourteenth Amendment of the U.S. Constitution. *Id.* at 40a-47a.

On May 25, 2005, the Missouri Court of Appeals denied American Family's petition. *Id.* at 3a; *State ex rel. American Family Mut. Ins. Co. v. Messina*, No. WD-65420 (Mo. Ct. App. May 12, 2004) (unpublished).

On May 26, 2005, American Family petitioned the Missouri Supreme Court for a writ of prohibition or mandamus, arguing that the trial court's order authorizing overinclusive notice to some 24,000 identifiable non-class members violated its due process rights under the Fourteenth Amendment of the U.S. Constitution. Pet. App. at 31a-38a.

On June 3, 2005, the Supreme Court of Missouri denied American Family's petition. Pet. App. at 1a-2a; *State ex rel. American Family Mut. Ins. Co. v. Messina*, No. SC-86864 (Mo. June 3, 2005) (unpublished).

Respondents informed American Family approximately two weeks ago that they anticipate sending the overinclusive notice authorized by the trial court on September 2, 2005.

REASONS FOR GRANTING THE WRIT

In the underlying opt-out state class action, the Missouri trial court ordered individual class notice sent to approximately 24,000 total-loss claimants who, everyone agrees, are identifiable non-class members who have no justiciable claim

against American Family. Although American Family argued that the trial court's overinclusive notice violated its due process rights under the Fourteenth Amendment of the U.S. Constitution, the Missouri Court of Appeals and the Missouri Supreme Court upheld the trial court's order and denied American Family's petitions.

At least two significant reasons exist for granting the petition. First, this case goes to the heart of the scope of a court's inherent judicial powers and implicates important due process rights. Indeed, the inquiry is whether a court can use its judicial powers to allow individuals to enter a lawsuit knowing that those individuals have no justiciable claim against the defendant. Although the Supreme Court has addressed an absent class member's due process rights as those rights relate to underinclusive class notice, the Court has never addressed a defendant's due process rights as those rights relate to overinclusive class notice.

Second and equally important, the Missouri Supreme Court's refusal to prohibit the trial court's overinclusive notice conflicts with the decisions of at least two federal courts of appeals, one state supreme court and numerous federal district courts. These courts have held that overinclusive notice is defective and, if class members are identifiable with reasonable effort, then reasonable effort must be used to identify them.

Because the facts in this case give rise to an important federal question concerning the scope of a court's judicial and jurisdictional powers under the Due Process Clause and because the Missouri Supreme Court's ruling on this question conflicts with the decisions of other federal and state courts, the petition for review should be granted.

I. THE MISSOURI DECISIONS RAISE IMPORTANT ISSUES OF FEDERAL DUE PROCESS

It is well established that due process requires that individual notice be given to class members who can be identified with reasonable effort in order to protect the due process rights of absent class members. *See, e.g., Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). As a result, underinclusive notice in an opt-out class action violates an absent class member's due process rights in situations in which an absent class member can be identified with reasonable effort. This long-standing due process requirement applies equally to a defendant in an opt-out class action lawsuit and, as a result, overinclusive notice violates a defendant's due process rights in situations in which non-class members can be identified with reasonable effort.

Under the Missouri Rules of Civil Procedure relating to class actions, a trial court is required to "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Mo. R. Civ. P. 52.08(c)(2). This language tracks the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 23(c)(2). Accordingly, the interplay between notice required under Rule 23 and the Due Process Clause is relevant to understanding that the notice language in Mo. Rule 52.08(c)(2) prescribes the constitutional minimum for purposes of due process.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the question before the Court was whether due process is violated when known beneficiaries of a common trust fund account received only notice by publication of a judicial settlement. The trustee in *Mullane* argued that notice by publication provided the beneficiaries with adequate due process to apprise them of the settlement, even though the

trustee knew the identities of the beneficiaries. *Id.* The Supreme Court disagreed, holding that "[w]here the names and post office addresses of those affected by a proceeding are at hand the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Id.* at 318. "Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties." *Id.*; *see also Schroeder v. City of New York*, 371 U.S. 208, 212-13 (1962) ("The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question.").

Although *Mullane* and *Schroeder* were not class action lawsuits, the Supreme Court has cited these cases on many occasions when defining the notice requirements of due process in Rule 23 class action lawsuits. For example, in the seminal case of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974), the Supreme Court held that Rule 23(c)(2), the federal counterpart to Mo. Rule 52.08(c)(2), "leaves no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort." The Court held that "publication notice could not satisfy due process where the names and addresses of the beneficiaries were known." *Eisen*, 417 U.S. 175 (citing *Mullane*, 339 U.S. at 306). As to due process relating specifically to Rule 23's notice requirements, the Court held that the "mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill the requirements of due process to which the class action procedure is of course subject." *Eisen*, 417 U.S. at 173 (ellipsis in original; internal quotation omitted). Therefore, *Eisen* suggests that Rule 23(c)(2) prescribes the constitutional minimum required for due process as to notice in class action lawsuits. *Id.* at 173-74 ("The

Committee explicated its incorporation of due process standards [into Rule 23(c)(2)] by citation to *Mullane* . . . and like cases"); *see also* 3 H. NEWBERG & A. CONTE, NEWBERG ON CLASS ACTIONS, § 8.4, at 175 (4th ed. 2002) ("It is now established beyond doubt that Fourteenth Amendment considerations prompted the Rule 23(c)(2) mandatory notice section.") (citing *Eisen*, 417 U.S. at 173-75).

However, it cannot be ignored that *Eisen* and the other Supreme Court opinions addressing the interplay between Rule 23 notice and due process have done so only in terms of the due process rights of the absent class members, not the due process rights of the defendant. Nevertheless, the facts in *Eisen* and other Supreme Court cases play a central role in examining a defendant's due process rights related to overinclusive notice in an opt-out class action.

In *Eisen*, the plaintiff argued that it would be prohibitively expensive to provide individual notice to 2.25 million class members and, therefore, notice by publication sufficed. 417 U.S. at 176. The district court determined that in 1966 it would cost ten cents to send each individual notice by mail (six cents for first-class postage plus four cents to stuff each envelope) and that the total cost of sending individual notice to the class was $225,000. *Id.* at 167. (In 2004 dollars, $225,000 equals $1,311,750. *See* www1.jsc.nasa.gov/bu2/inflateCPI.html.) The district court in *Eisen* concluded that neither Rule 23 nor due process required such a substantial expenditure and ordered a less onerous notification scheme costing $21,720. *Eisen*, 417 U.S. at 167. However, the Supreme Court disagreed, holding that "[t]here is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbook of particular plaintiffs." *Id.* at 176. Because the names and addresses of 2.25 million class members were ascertainable, the Court required

that "individual notice be sent to all class members who can be identified with reasonable care." *Id.* at 177.

In this case, it is undisputed that over 465,000 class and non-class members are slated to receive notice on September 2, 2005, and it is further undisputed that notice is overinclusive by some 24,000 non-class members (i.e., the total-loss claimants). Moreover, it is undisputed that respondents have acknowledged that they can identify the actual class members by merging the electronic and hard-copy data and, in fact, they proposed to do so as part of the class certification process. Pet. App. at 29a. Given that the identities of the class members are ascertainable, just as they were in *Eisen*, individual notice must be sent only to class members to prevent a situation in which, in violation of its due process rights, American Family is forced to litigate against its own policyholders who have no justiciable claim.

American Family is injured by overinclusive notice in at least three ways: (1) it is forced to defend against identifiable policyholders who, everyone agrees, have no justiciable claim; (2) its goodwill with these policyholders will be harmed when they receive class notice that alleges, among other things, that "American Family pays less than required" to repair its policyholders' vehicles, even though everyone agrees that these policyholders have not been paid less than required and are not adverse to American Family; and (3) American Family's settlement posture is hindered because the class is larger than it should be by some 24,000 identifiable non-class members. *See, e.g., Katz v. Carte Blanche Corp.*, 496 F.2d 747, 761 (3d Cir. 1974), *cert. denied*, 419 U.S. 885 (1974) (noting that in a class action "[a]nother incentive to the [plaintiff's] bar is the increased settlement leverage which results from aggregating small claims"). Non-class members who receive opt-out notice and do nothing are transformed into plaintiffs automatically. As a result, American Family and its policyholder-claimants

become adversaries even though they are not adverse, which harms American Family's business relationships.

American Family anticipates that respondents will argue that the trial court in this case ordered both notice by publication and notice by mail and that, because courts have upheld such dual notification, notice by publication is the ultimate overinclusive notice. However, in this case, the court entered an order identifying class members and then knowingly ordered non-class members to receive individual notice by mail to decide whether to opt-out of the lawsuit. If an American Family policyholder is not one of the approximately 465,000 notice recipients authorized by the trial court, that person is not a member of the class unless he or she petitions to become a member of the class. Therefore, it is the trial court's notice order that improperly places these 24,000 non-class members into this class action, not the class definition nor the notice by publication.

In addition, the fact that the trial court may require respondents to remove non-class members before any distribution occurs does not negate or lessen the due process violation or the harm that has already taken place. Pet. App. at 16a. American Family's due process rights are violated and injury occurs the moment some 24,000 non-class members (its own policyholders) receive notice and become adversaries when that they are not adverse. If respondents must identify and remove the non-class members before any distribution occurs, as the trial court appears to suggest, then no reason exists to fail to require them to do so for the purposes of notice in order to protect American Family's due process rights.

Another issue that the Supreme Court settled in *Eisen* plays a role in evaluating the importance of this petition, namely, whether a defendant is required to bear the cost of notice.

Because the plaintiff in *Eisen* could not afford to pay even the $21,720 expenditure needed to facilitate notice under the district court's alternative notice plan, the district court ordered the defendant to bear 90% of the cost of the notice. *Eisen*, 417 U.S. at 168. However, the Supreme Court held that the district court shifted costs to the defendant improperly, stating that "petitioner's effort to impose the cost of notice on the respondents must fail" and holding that a plaintiff "must pay for the cost of notice as part of the ordinary burden of financing his own suit." *Id.* at 178-79. Indeed, if the representative plaintiff is unable to finance the cost of notice to the class, then, by definition, he or she fails to meet the requirements needed to maintain a class action. *Id.* at 177 (cost-shifting to defendant "contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it"). In the end, because the plaintiff in *Eisen* had maintained consistently that he would not bear the cost of notice, the Court remanded the action with instructions to dismiss the class. *Id.* at 179.

In this case, the Missouri trial court went even a step further than improperly requiring a defendant to bear the expense of identifying the class members. (Although the trial court did fault American Family for failing to identify the class members. Pet. App. at 17a.) Even though American Family offered to perform respondents' task of identifying the actual class members while reserving its right to recoup the costs from respondents, *id.* at 50a-51a, the trial court refused to allow it to do so, *id.* at 4a-6a. Therefore, the trial court did more than just shift the costs of identifying class members to American Family, instead, it refused to allow *anyone* to identify them. This is improper and violates American Family's due process rights.

Like the facts in *Eisen*, the facts in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978), illustrate the constitutional infirmities with the trial court's actions. In *Oppenheimer*, the proposed class consisted of about 121,000 individuals who had purchased certain fund shares at an allegedly inflated price. Of those 121,000 individuals, 103,000 still held shares of the fund; however, 171,000 individuals currently held shares in the fund, meaning that approximately 68,000 current members of the fund were not members of the class. *Id.* at 344-45.

In order to identify the class members, a third-party testified that "they would have to sort manually through a considerable volume of paper records, keypunch between 150,000 and 300,000 computer cards, and create eight new computer programs for use with records kept on computer tapes that either are in existence or would have to be created from the paper records." *Id.* at 345. As a result, the district court shifted the costs from the plaintiffs to the defendants for performing this identification effort. However, the Supreme Court reversed, holding that the plaintiffs had to pay to identify the members of their own class. *Id.* at 364.

The holdings in *Eisen* and *Oppenheimer* are instructive in this case because each required the plaintiffs to identify their class members in situations more onerous or more costly than those present in this case. These cases suggest further that class notice for due process purposes is not a concept applicable only to absent class members. A defendant, like an absent class member, is entitled to the "best notice practicable" as well as "individual notice to all members who can be identified through reasonable efforts" in order to comport with due process. Mo. R. Civ. P. 52.08(c)(2); Fed. R. Civ. P. 23(c)(2). Requiring a defendant to litigate against individuals who lack a justiciable claim and who can be identified with reasonable effort defies all notions fair play and due process.

Finally, the Missouri Supreme Court, like the U.S. Supreme Court, requires a plaintiff to have a legally cognizable injury and that a case or controversy exist in order to bring that matter before the court. *See Levinson v. Missouri*, 104 S.W.3d 409, 411 (Mo. 2003) ("A justiciable controversy exists where the plaintiff has a legally protectible interest at stake, a substantial controversy exists between parties with genuinely adverse interests, and that controversy is ripe for judicial determination.") (citing *Missouri Health Care Ass'n v. Attorney General of the State of Missouri*, 953 S.W.2d 617, 620 (Mo. 1997)). "A controversy is ripe if the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that is presently existing, and to grant specific relief of a conclusive character." *Levinson*, 104 S.W.3d at 411 (citing *Missouri Health Care*, 953 S.W.2d at 621).

This well-established Missouri law serves to underscore the due process violation taking place. The Missouri trial court is allowing individuals with no justiciable claims to participate in this lawsuit as litigants even though Missouri law itself prohibits a court from doing so. As a result, the Missouri trial court is acting beyond its jurisdiction and, therefore, in violation of American Family's due process rights. *See, e.g., Powell v. Alabama*, 287 U.S. 45, 47 (1932) (due process requires a court of competent jurisdiction); 16B AM JUR 2D, *Constitutional Law* § 966 (2d ed. 1998) ("Unless jurisdiction exists, the judgment rendered is not by due process of law, and is ineffectual for any purpose; no rights are in any way affected by it, from it no rights can be derived, and all proceedings founded thereon are void and not entitled to any respect in any other tribunal."); 20 AM JUR 2D, *Courts* § 58 ("a court possesses no jurisdiction where the constitution or legislature expressly denies jurisdiction") (collecting cases). Under Missouri law, an individual must have a legally cognizable injury to be a

plaintiff and, in this case, it is undisputed that the court has authorized non-class members with no justiciable claim to become plaintiffs in this opt-out class action lawsuit. This violates American Family's due process rights.

In sum, the Missouri trial court's overinclusive notice coupled with the Missouri Supreme Court's refusal to prohibit the trial court's actions give rise to an important federal question, namely, whether a defendant's due process rights are violated when a court authorizes overinclusive notice be sent to some 24,000 identifiable individuals who have no justiciable claim. The Court should grant the petition and resolve this significant issue of constitutional dimension.

II. THE MISSOURI DECISIONS CREATE CONFLICT AMONG FEDERAL AND STATE COURTS

In addition to giving rise to an important federal question worthy in and of itself of Supreme Court review, the Missouri Supreme Court's refusal to prohibit the trial court from ordering overinclusive notice also conflicts with the decisions of two federal circuit courts, one state supreme court and numerous federal district courts.

In the often-cited case *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088 (5th Cir. 1977), the Court of Appeals for the Fifth Circuit held that "once a 23(b)(3) action has been certified, the name and last known address of each class member known to the parties or capable of being identified from business or public records available to them must be produced." *Id.* at 1098. In *Nissan*, just as in this case, everyone agreed that, by examining 1.7 million RDR (retail delivery report) cards against a computer listing, the overinclusive list would be reduced to the actual 371,000 class members (i.e.,

original retail purchasers of new Datsun vehicles who purchased between 1966 and 1973 in 10 states). *Id.* at 1092-94.

Because the district court in *Nissan* described the task of identifying class members as "herculean" and an "unnecessarily time consuming and burdensome process," it directed the defendants to compile a list, at their expense, of the names and addresses of current registered Datsun owners and did so even though there was no correlation between current registered Datsun owners and the class members. *Id.* at 1096-97. The Fifth Circuit disagreed and ordered the plaintiffs to extract, at their expense, the names and addresses of the class members from the defendants' business records and mail notice to each class member. *Id.* at 1093. In other words, the Fifth Circuit rejected the use of overinclusive notice in light of the fact that the individuals at issue were identifiable through reasonable effort. In fact, the Fifth Circuit held that overinclusive notice was "defective." *Id.* at 1099 ("The class notice is defective in two aspects. Current, registered Datsun owners is an overinclusive group."). Although the effort to identify the class members was large, the Fifth Circuit held that "[t]he key, though, is reasonable effort, and a large class requires a large effort" and, moreover, that "due process makes the cost and effort reasonable." *Id.* at 1100. The Fifth Circuit recognized that the word "reasonable" could not be ignored, but noted that:

> Here, we know that the RDR cards provide the court with the best available listing of the names and addresses of all class members. Indeed, the parties agree on this. They only shy from undertaking the effort. While the search cannot be made with push-button ease, its advantages bring the effort required within the range of reasonableness.

Id. at 1099. Therefore, the Fifth Circuit established that "reasonable effort" is not measured by the time or expense

involved when due process concerns are at issue, but rather the likelihood of identifying class members. *Id.* at 1100 ("While the mechanical process of examining the cards may prove to be expensive and time-consuming, the individual right of absentee class members to due process makes the cost and effort reasonable.").

Likewise, the issue in this case is whether respondents must identify and remove some 24,000 non-class members from a group consisting of approximately 465,000 class and non-class members. Although the class size is moderately large, as the Fifth Circuit instructs, "a large class requires a large effort." *Nissan*, 552 F.2d at 1100. During the class certification hearing, respondents promised to identify class members and never asserted that the task would require an unreasonable effort. Pet. App. at 29a. In fact, the effort required today to identify the class members is no different than the effort required the day respondents promised to do so. In any event, notwithstanding respondents' change of heart, the facts in this case are strikingly similar to the facts in *Nissan*, but with a different result. In *Nissan*, the court of appeals held that overinclusive class notice was "defective" and that a reasonable effort for purposes of due process means that a representative plaintiff must identify class members even when the class is large. Accordingly, the Missouri Supreme Court's refusal to prohibit the trial court's overinclusive notice creates a direct conflict with the Fifth Circuit.

The Fifth Circuit is not the only federal or state court to weigh in on this side of the overinclusive issue. The Court of Appeals for the Second Circuit, for example, refused to authorize overinclusive notice when it was clear that not all intended recipients were class members. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987), *cert. denied sub nom.*, *Adams v. United States*, 484 U.S. 1004 (1988). In *Agent*

Orange, the plaintiffs requested that 2.4 million Vietnam veterans receive notice of their class action even though it was undisputed that this group included non-class members. *Id.* at 169. The Second Circuit held that, "We cannot agree with appellants that all 2.4 million Vietnam veterans should have been sent letter notice" noting that "it is undisputed that far fewer than that number were exposed to Agent Orange." *Id.* In rejecting the plaintiffs' proposed notice, the Second Circuit held that "[a] requirement that notice be given to all Vietnam veterans would thus have been considerably overbroad." *Id.*

The highest court in Alabama also has refused to allow overinclusive notice in an opt-out state class action, holding that "it will serve no legitimate purpose to tell nearly 10,000 Central Bank customers [i.e., non-class members] of the pendency of an action in which they -- under the theory of this case -- cannot participate." *Ex parte Central Bank of the South*, 675 So. 2d 403, 407 (Ala. 1996) (footnote omitted). In addition, many federal district courts have disallowed overinclusive notice in an opt-out class action lawsuits. *See, e.g., Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314, 327-28 (E.D. Pa. 1993) (disallowing overinclusive identification because "[f]ar fewer of those persons whose names would be generated are indeed members of the class" and noting that "[a]lthough providing each person on the computer list with individual notice would have been expensive for the named plaintiff in *Eisen*, and therefore extremely burdensome, actually identifying those persons as class members was clearly possible through reasonable efforts"), *In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 534, 546 (N.D. Ga. 1992) (overinclusive notice "would most likely confuse the recipients and encourage claims by non-class members"); *Collins v. International Dairy Queen, Inc.*, 169 F.R.D. 690, 692 (M.D. Ga. 1997) (rejecting plaintiffs' request that notice be sent to individuals who were bound by mandatory arbitration clauses, reasoning that those individuals

"are not entitled to litigate relevant claims against the defendants in court and should not receive notification of this class action").

These cases establish that Missouri Supreme Court's order refusing to prohibit the trial court's overinclusive notice to some 24,000 identifiable non-class members who, everyone agrees, have no justiciable claim creates a direct conflict with the decisions of at least two federal circuit courts, one state supreme court and numerous district courts. Because of this conflict among the lower courts, the Supreme Court should grant the petition.

CONCLUSION

Based on the foregoing reasons and authorities, the United States Supreme Court should grant the petition for writ of certiorari.

Respectfully submitted,

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AUGUST 2005

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF MISSOURI

May Session 2005

State ex rel. American Family Mutual
Insurance Company,

Relator,

No. SC86864 **PROHIBITION/MANDAMUS**

The Honorable Edith L. Messina,

Respondent.

Now at this day, on consideration of the petition for writ of prohibition or, in the alternative, for writ of mandamus herein to the said respondent, it is ordered by the Court here that the said petition be, and the same is hereby denied. Relator's emergency motion for stay of issuance of class notice overruled as moot. White, C.J., Stith and Limbaugh, JJ., not participating.

STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 2005, and on the 3rd day of June, 2005, in the above-entitled cause.

WITNESS my hand and the Seal
of the Supreme Court of Missouri,

at my office in the City of Jefferson
this 3rd day of June, 2005.

Thomas F. Simon _____ Clerk

Kathy K. Fletchall _____ *D.C.*

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD 65420

STATE OF MISSOURI, ex rel.,
AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Relator,

v.

THE HONORABLE
EDITH L. MESSINA,
Judge of the 16th Judicial Circuit
Jackson County, Missouri,

Respondent.

ORDER

Petition for writ of prohibition or mandamus is denied.

Entered this 25 day of May, 2005.

/s/ Paul M. Spinden
Paul M. Spinden, Presiding Judge
Writ Division

Lisa White Hardwick, Judge, concurs

APPENDIX C

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

Case No. 00CV21154
Division 12

Nicholas H. Smith an Amy and Bryce Johnson, on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

v.

American Family Mutual Insurance Company,

Defendant.

ORDER AND NOTICE OF SPECIAL SETTING

NOW on this 28 day of March, 2005, the Court takes up and considers the above-captioned matter, and having held a conference on March 24, 2005 with all counsel, the Court hereby Orders as follows:

1. All affirmative defenses to be included in the notice shall be prefaced with the language "American Family contends". Defendant's proposed affirmative defenses # 5 and # 6 shall be further revised as agreed by counsel during the conference. Proposed affirmative defense # 7, which states, "American Family contends that this notice is contrary to Missouri law because it does not sufficiently inform potential Class members about the peculiarities of plaintiffs' claims and the risks to Class members who remain in the

case and is being sent to thousands of insureds who are not members of the Class", shall be stricken from the notice. The parties are instructed to make the final revisions as discussed during the conference and submit them to the Court for final approval on or before March 30, 2005.

2. Disk #4 shall be turned over to Plaintiffs on or before April 15, 2005.

3. The Plaintiffs' proposed language giving notice to total loss claimants that they are not members of the class is deemed sufficient by the Court.

4. The opt-out period for members of the class shall be ninety (90) days from the date of the first mailing of the notice.

5. The parties shall submit briefs to the Court on the issue of remailing of notices and the payment of costs associated with any such remailing. Said briefs shall be filed on or before April 6, 2005.

6. Plaintiffs' proposed Notice as attached to this Order is hereby approved by the Court, except that Defendant's affirmative defenses are to be included once approved by the Court.

7. A pretrial conference will be held on Friday, January 13, 2005 at 9:30 a.m. and trial will begin on Wednesday, February 1, 2006 at 9:30 a.m.

IT IS SO ORDERED.

Date: 3/28/05
/s/Edith L. Messina

Judge Edith L. Messina
Division 12
CERTIFICATE OF MAILING
It is hereby certified that a copy [o]f the forgoing was sent via U.S. Mail, postage prepaid, this 30 day of March, 2005, to the following:

Michael E. Waldeck
120 W 12th St, Ste 1300
Kansas City, MO 64105

David F. Oliver
Two Emanuel Clever II Blvd, Ste 500
Kansas City, MO 64112

[Attachments Omitted]

APPENDIX D

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

Case No. 00CV211554
Division 12

Nicholas H. Smith and
Amy and Bryce Johnson, on Behalf of
Themselves and All Others Similarly
Situated,

Plaintiffs,

vs.

American Family Mutual
Insurance Company,

Defendant.

ORDER

NOW on this 24th day of Feb., 200[5], the Court takes up and considers the above-captioned matter and several motions relating to the issue of Notice to the Class. After considering the motions, responses and objections, and arguments by counsel, the Court hereby Orders as follows:

1. The Corrected Motion and Affidavit for American Family's Statement of Facts Giving it Defenses to Plaintiffs' Claims is DENIED as the Court finds the language proposed by Defendant to be inappropriate. Defendant shall resubmit proposed language on the issue of affirmative defenses to be included in the Class Notice on or before February 25, 2005.

2. Defendant American Family's Motion to Preclude the Use of Disk 3 for the Purpose of Notice in This Case is DENIED. Defendant shall turn over Disk 3 to counsel for Plaintiffs.

3. Plaintiff's Cross-Motion to Expand the Class Definition and Approve of Affirmative Defense Language to be Included in Notice is GRANTED in part and held in ABEYANCE in part. Plaintiffs' request to expand the class definition is granted and the class is expanded to include American Family policyholders submitting claims through December 1, 2004. As discussed by counsel during the phone conference on February 17, 2005, Defendant is to compile these additional class members on a disk to be entitled "Disk 4" and turn such disk over to counsel for Plaintiffs. Plaintiffs' request for the Court's approval of Plaintiffs' proposed language concerning Defendant's affirmative defenses is held in abeyance to allow the Court to review the language to be submitted by Defendant as ordered above.

IT IS SO ORDERED.

Date: 2/24/05
/s/ Edith L. Messina
Judge Edith L. Messina
Division 12

CERTIFICATE OF MAILING

It is hereby certified that a copy of the foregoing was sent via U.S. Mail, postage prepaid, this 25 day of February, 2005, to the following:

Michael E. Waldeck
120 W 12th St, Ste 1300

Kansas City, MO 64105

David F. Oliver
Two Emanuel Clever II Blvd, Ste 500
Kansas City, MO 64112

TRUE COPY - ATTEST
CIRCUIT COURT OF JACKSON COUNTY, MO
COURT ADMINISTRATOR'S OFFICE
DEPARTMENT OF CIVIL RECORDS

BY _____ DCA

APPENDIX E

IN THE CIRCUIT COURT OF MISSOURI
JACKSON COUNTY, DIVISION 12
HONORABLE EDITH L. MESSINA, JUDGE

Case No. 00CV211554

NICHOLAS SMITH AND AMY AND
BRYCE JOHNSON,
wive and husband, on behalfof themselves and all
others similarly situated,

Plaintiffs,

vs.

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Defendant.

TRANSCRIPT OF TELEPHONE CONFERENCE

On FEBRUARY 17, 2005, the above cause came on for telephone conference before the HONORABLE EDITH L. MESSINA, Judge of Division No. 12 of the 16th Judicial Circuit Court of Missouri.

• • •

THE COURT: Okay. The second issue?

MR. WALDECK: Has to do with the disk, Your Honor.

THE COURT: Yeah. Yeah. I'm sorry, go ahead. I didn't mean to interrupt you.

MR. WALDECK: Van, go ahead. If you'd speak to that.

MR. BUNCH: Thank you. Your Honor, this is Van Bunch of Bonnett, Fairbourn, Friedman & Balint for the plaintiffs. This submission is --

THE COURT: You're going to have to be slower and louder, okay, just because the court reporter's having some difficulty. Okay. Yes, I'm sorry. Go ahead.

MR. BUNCH: I can tell you that it's a rare thing for someone to suggest I talk too fast, but I'll take that advice,

The Disk 3 issue is what prompted this hearing to begin with, because the defendant, after we went through some negotiations over cleaning up the proposed notice list, decided that they could not get down to the point where they eliminated everyone and filed a motion asking Your Honor to basically send us to Madison to go through 463,000 files or something to then look at each and every claim file to determine who is in the class and out of the class.

And what we had achieved in the period of negotiation was to provide the defendant with some information that they could use, based on their own computer system, to winnow out the claims. And they did so through the process of some depositions, some follow-up correspondence between us, to get down to the point where there are 4.5 percent on average of the claims on the disk that are overstated.

So the disk is 95.5 percent accurate in terms of the scope of the class members. And they suggest that we should go and look at 468,782 files to eliminate 23,923 of them. Our position is that we've done more than is normally done in terms of trying to winnow down the class notice list. And

everyone has done a lot of work to get to the point where we are. And we feel it's sufficient at this point in time simply to add a sentence in bold type, all capitals if you want, to the notice that says: If you received payment for a total loss claim and retained your vehicle, you are not a member of the class. And we think that should suffice to let the notice go out on Disk 3 as constructed now.

THE COURT: And is there a response? Is there a response?

MR. MUNSON: Yes. Again, it's Earl Munson, Your Honor. The rule, however, requires that we give notice to the people who are in the class. And if I understand, Mr. Bunch agrees that there are some twenty to 25,000 that we cannot identify as owner retained total losses. He's right, we've made great efforts to try to do that. That is, American Family has made great efforts to try to do that.

In addition, of course, as we've indicated already in the pleadings -- I won't repeat them -- but that there are owner kept total losses in there or owner kept claims in there of approximately 45,000. And there are approximately, very rough guess, of 50,000 estimates made by body shops selected by the owner of the vehicle. All of these are issues that ought not be giving them notice since they're not a part of the class.

And the complaint that they say that they don't want to come in and look at the copies of the estimates is answered twofold. One, they've clearly assured Judge Oliver that' s exactly what they were going to do; and two -- and - -

MR. BUNCH: Judge Clark.

MR. MUNSON: Judge Clark, I'm sorry. Judge Oliver, right -- Judge Clark that that's exactly what they were going

to do. And two, they have – we've offered them the opportunity of doing that check through computer of the ADP. Now that 's not all of the claims, granted, but that still is an opportunity for them to try to eliminate through computer collection.

Again, we think it is -- it is clear that there must be the effort to eliminate nonclass members, and that' s what the order says.

MR. BUNCH: Your Honor, if I may, just briefly, on the point about these so-called independent body shops, the notice that was approved here is to go out to all people who submitted claims except glass and total losses. So this issue is a nonstarter to begin with for these so-called independent body shops.

I did a little back-of-the-envelope calculation that if we went through the total number of files that they said and limited our search to five minutes per file, it's a total of 7,750 12-hour days to get to the end. I don't think that we want to wait that long. And I don't think that reasonableness demands that we go through a process that extensive to eliminate just these few claims who can be put on fair notice they're not a member of the class with a simple legend on the notice. And the law that we've cited to you as well is clear that simply because the class definition is overinclusive is not sufficient objection to the sending of the notice to these people on this.

THE COURT: Okay. What's --

MR. NEWBROUGH: You know, Your Honor - - well, this is Gerry Newbrough. We're very aware of the Court's time, how busy the Court is. And it's obvious to us that you haven't had an opportunity to just really dwell on all of our pleadings the last few months. But we have detailed --

American Family has detailed it in a line-by-line, all of the overnotice issues that are involved by just sending it out to all the claimants. This 15 minutes that we've reserved here for this – this conference today really doesn't do justice to those arguments.

We believe that fully one-half of those people are not in the class. And it's -- I guess I don't understand the argument I just heard about how it's, you know, just a small matter. It's not a small matter. And the cases indicate it's not a small matter, as well as the facts of this case.

THE COURT: I'm sorry, what -- tell me again what the language is. I've got it in front of me. Tell me exactly what the language is that you want to use.

MR. BUNCH: The proposed legend?

MR. WALDECK: Yes, Van, give that to her again, please.

MR. BUNCH: I would say something along the lines of: If you received payment on a total loss claim and retained the salvage or your car, then you are not a member of the class.

THE COURT: Okay. Is there -- is there anything else?

MR. WALDECK: No, Your Honor.

MR. MUNSON: Well, in response to that -- Earl Munson. We're going back to 1992.

THE COURT: Right.

MR. MUNSON: That's a purely, clearly unrealistic admonition to people who receive class notices through the mail.

THE COURT: Because?

MR. MUNSON: Because I don't remember what kind of a car I owned in 1992, much less what the repair was. It is initially, at the very beginning stages of notice, the obligation of the plaintiffs to give notice to those people whom they can identify.

MR. WALDECK: You know, that's precisely what we're doing, Your Honor. And we're back again re-arguing these same issues again and again and again that you've ruled on.

THE COURT: Excuse me. Wait, wait, wait, wait. Wait a minute, hold on. Whoa. Whoa. Was that Mr. Waldeck who made that comment?

MR. NEWBROUGH: No, the person who just spoke, Your Honor, was Gerry Newbrough.

MR. WALDECK: I spoke before, Your Honor, yes.

MR. NEWBROUGH: Recently excluded people who had total losses.

THE COURT: Well, let me tell you, I -- the -- we have looked at this, actually, and the notice can go out as proposed in that regard. Unless the insurance company wants to go back and ferret these people out themselves, I -- it -- I don' t know what else the plaintiffs can do. To have to go through 7,000 hours of looking at the files does not seem reasonable.

The -- there surely are more exact records that the insurance company has. I mean I know there is an issue with this disk that has been turned over. But the class seems to me to be clearly defined; the exclusion seems to be clearly defined. And I am assuming that the plaintiffs will -- and maybe I'm assuming incorrectly -- that as these things come in, that the plaintiffs will ferret through them to make sure that only the members of the class are in fact given access.

Am I incorrect about that? Mr. Waldeck?

MR. WALDECK: Van, would you speak to that, please?

MR. BUNCH: I'm going to let the siren pass, whatever that was. I think what Your Honor is referring to is at the end of the day, will class members be -- will only class members receive any distribution in the case?

THE COURT: Right.

MR. BUNCH: And that is, of course, correct.

THE COURT: Right.

MR. BUNCH: At this end all we're doing is providing people an opportunity to exclude themselves from the class. And, of course, anyone who so chooses to opt out, we would not follow up with them unless they asked us to.

MR. NEWBROUGH: Your Honor, I would point this out. If plaintiffs were to --

THE COURT: I'm sorry. Wait a minute. You have to identify yourselves. I don't know who asked for the record. It's perfectly fine that somebody did. But if we're going to

do this over the phone, my court reporter needs to know who is talking, so please identify yourselves.

MR. NEWBROUGH: This is Gerry Newbrough, Your Honor. I was trying to point out -- and I apologize for not identifying.

THE COURT: No, no, that's okay.

MR. NEWBROUGH: What I was trying to point out was that if plaintiffs were to do what they promised Judge Clark they would do in order to convince him to certify the case, as that was being done, these 24,000 people would pop out. They could be easily identified as part of the same process.

THE COURT: Well, the problem is they have an enormous number of files that -- that you have given them, apparently, have suggested they have access to. You haven't -- I don't think the defendant in this instance has done anything to ferret those people out. And I don't know that the plaintiffs at this point have much choice in terms of moving forward but to go ahead and define the class as they have and to define the exclusion as they have. So --

MR. NEWBROUGH: For as many hours as it takes -- Your Honor, this is Gerry Newbrough again. For as many hours as it takes for plaintiffs to do what they promised to do, American Family will spend the same amount of hours going through those files. We cannot unilaterally go through those files and identify people who in fact did not have omitted repairs or who in fact omitted repairs were not necessary to repair the vehicle to preloss condition. We can't do that without plaintiffs' cooperation and participation. Therefore, we have not.

MR. WALDECK: Your Honor, it's Mike Waldeck again. Please understand that what we're proposing to do is commonplace and frequently the case, that you can never get it down to a precise number. As Van just suggested to you, at the end of the day, if there's somebody that's not supposed to be in the class or participate in a trial judgment or settlement, they're winnowed out. We've done all that can be reasonably required of us and yet we're being faced with the issue of we're going to go through this war of attrition. Each time there's a step in this where you have to reprove your right to do it. And we'd urge the Court to go forward just as you've suggested.

THE COURT: All right. The notice can go out as suggested then by the plaintiffs.

And the third issue that I think is open for discussion is the contents of Disk 3. Is that right?

THE LAW CLERK-BAILIFF: I think it's whether we can expand the class to this additional year that we've lost.

• • •

REPORTER'S CERTIFICATE

I, Susan L. Steen, Certified Court Reporter, hereby certify that I am the official court reporter for Division 12 of the Jackson County Circuit Court, that on FEBRUARY 17, 2005, I was present and reported all of the proceedings had in the case of NICHOLAS SMITH AND AMY AND BRYCE JOHNSON, et al., Plaintiffs, vs. AMERICAN FAMILY MUTUAL INSURANCE COMPANY, Defendant, CASE NO. 00CV211554. I further certify that the foregoing 34

pages contain a true and accurate reproduction of the proceedings transcribed.

/s/ Susan L. Steen, CCR, RMR
Susan L. Steen, C.C.R. #0283
Official Court Reporter, Div. 12

Transcript completed: February 22, 2005

APPENDIX F

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

Case No. 00CV211554
Division 12

Nicholas H. Smith and
Amy and Bryce Johnson, on Behalf of
Themselves and All Others Similarly
Situated,

Plaintiffs,

vs.

American Family Mutual
Insurance Company,

Defendant.

ORDER

NOW on this 13 day of August, 2004, the Court takes up and considers the above-captioned matter and several motions relating to the issue of Notice to the Class. After considering the motions, responses and objections, and arguments by counsel, the Court hereby Orders as follows:

1. After due consideration of Class Plaintiffs' Amended Suggestions in Support of Proposed Forms of Notice and Initial Notice Plan ("Plaintiffs' Notice Plan"), Defendant's objections thereto, and argument of counsel, IT IS HEREBY ORDERED that Class Notice is approved in the form

attached to this Order as Attachment A. The Class Notice shall be given:

(a) by direct mail to all policyholders that submitted claims for repairs to their insured vehicles during the class period, except those who were paid for total losses and those whose claims involved only glass repairs;

(b) by publication in *The Kansas City Star*, the *St.Louis Post-Dispatch*, and the *Jefferson City Post-Tribune* for two consecutive Sundays beginning the week direct mail notice is sent in the form in Attachment B.

(c) through an internet website to be established by Plaintiffs containing the formal Notice approved by this Court, and information in the question and answer format as set forth in "Attachment C" to Plaintiff's Notice Plan; and

(d) through a toll-free telephone line which shall contain a recorded message describing the action as set forth in "Attachment E" to Plaintiffs' Notice Plan.

IT IS SO ORDERED.

Date: 8/13/04
/s/Edith L. Messina
Judge Edith L. Messina
Division 12

CERTIFICATE OF MAILING
It is hereby certified that a copy [o]f the forgoing was sent via U.S. Mail, postage prepaid, this 13 day of August, 2004, to the following:

Michael E. Waldeck
120 W 12th St, Ste 1300
Kansas City, MO 64105

David F. Oliver
Two Emanuel Clever II Blvd, Ste 500
Kansas City, MO 64112

TRUE COPY - ATTEST
CIRCUIT COURT OF JACKSON COUNTY, MO.
COURT ADMINISTRATOR'S OFFICE
DEPARTMENT OF CIVIL RECORDS
By_____ DCA

APPENDIX G

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

Case No. 00-CV-211554
Division No. 3

NICHOLAS SMITH, on behalf of himself and all other similarly situated

Plaintiffs,

vs.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Defendant.

ORDER GRANTING MOTION FOR CLASS CERTIFICATION

This Court, pursuant to the provisions of Rule 52.08, and the matter having come before the Court to consider the issues of class certification, and the Court having conducted a rigorous evidentiary hearing over seven days, considered the briefs, affidavits, testimony and exhibits submitted by the parties, the pleadings and records on file and the arguments presented by counsel, and being fully advised in the premises:

IT IS HEREBY ORDERED as follows:

1. The class of persons and entities which plaintiffs may represent in this action is as follows:

> All American Family insureds nationwide who, from or after May 11, 1990 until the date of this Order, made a claim for vehicle repairs pursuant to their policy and who received payment based on an estimate prepared or approved by American Family which included Non-OEM Crash Parts[1] and/or did not include one or more Omitted Repairs,[2] where the vehicle was not a total loss.

Excluded from the Class are all directors, officers, agents and/or employees of American Family. Also excluded from the Class are all persons who have claims in excess of $75,000.00.

2. The Court finds that plaintiffs have met the burden of satisfying the four prerequisites of Missouri Rule of Civil Procedure 52.08(a), including:

---

[1] "Non-OEM Crash Parts" include: fenders, hoods, doors, deck lids, quarter panels, rear outer panels, front end panels, header panels, filler panels, door shells, pickup truck beds, box sides and tail gates, radiator and grill support panels, grilles, head and tail lamp mounting panels/brackets/housings/lenses, doors, bumpers (excluding chrome), bumper covers/face bars, and bumper brackets/supports.

[2] "Omitted Repairs" include: seat belt check, rust proofing, weld through primer, undercoating, flex additive, masking inner surfaces, front wheel alignment, four wheel alignment, aim lamps and replace EPA label.

(a)(1) The number of potential class members is in the tens of thousands, and therefore the class is so numerous that joinder of all members is impracticable.

(a)(2) There are questions of law and fact common to the class.

(a)(3) The class representatives' claims are typical of the claims of the class.

(a)(4) The class representatives will fairly and adequately protect the interests of the class, because there are no antagonistic interests between the named plaintiffs and the class members, and plaintiffs' counsel are competent to conduct the litigation.

3. Further, the Court finds that the requirements of Rule 52.08(b)(3) are met, as common issues of law or fact predominate over questions affecting only individual class members, and the class action mechanism is superior to other available methods to fairly adjudicate plaintiffs' claims. Specifically, the Court finds that plaintiffs' claims arise out of a common course of conduct and out of standardized insurance policies.

4. Notice of the pendency of this action shall be provided to all members of the Class defined herein above who can be identified through reasonable efforts.

5. Counsel are directed to submit, within 30 days of the date of this Order, proposed forms of notice to members of the Class which comply with the requirements of Rule 52.08(c)(2).

6. The firms of Niewald, Waldeck & Brown; Milberg Weiss Bershad Hynes & Lerach LLP; Bonnett, Fairbourn, Friedman & Balint, P.C.; and Parry, Deering, Futscher & Sparks, P.S.C. are appointed as Class Counsel.

7. This Order remains subject to modification, correction, restriction and/or amendment as further information is provided.

8. Counsel may reclaim trial exhibits for safekeeping at their convenience.

IT IS SO ORDERED.

Dated: December 14, 2001
/s/Thomas C. Clark
Thomas C. Clark
Circuit Judge, Division No. 3

A TRUE COPY ATTEST CIRCUIT COURT OF JACKSON COUNTY, MO. COURT ADMINISTRATOR'S OFFICE DEPARTMENT OF JUDICIAL RECORDS BY /s/ Sharon B. Snyder DCA

APPENDIX H

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI 16TH JUDICIAL CIRCUIT, DIVISION 3

Case No. 00-CV-211554

NICHOLAS H. SMITH and
AMY AND BRYCE JOHNSON, on
Behalf of Themselves and All
Others Similarly Situated,

Plaintiffs,

vs

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Defendant.

VOLUME VIII

DRAFT TRANSCRIPT OF PROCEEDINGS

On Monday, the 29th day of October, 2001, the above case came on for hearing before the Honorable Thomas C. Clark, Judge of Division 3 of the Jackson County Circuit Court of Missouri. The following is a draft transcript of the eighth day's proceedings, November 7, 2001.

N. Diane Woolery, C.C.R.
Official Court Reporter - Division 3
Jackson County Courthouse
415 E. 12th Street
Kansas City, Missouri 64106

* * *

So, the legal test, or the test that American Family was taking at that point in time was that they had to be of equal quality to OEM parts. So, if you want to look at it from the other side of the issue, is that inconsistent with the states, no. Did they acknowledge they had that duty? Yes, they did with that document right there.

THE COURT: Okay. Next question, who decides? And, let me tell you what I'm surmising and then you tell me where I'm off base, okay? Mr. Oliver said, you know, Mr. DeRungs -- well, he was the only body man that came in here. And, he's the one that said he could look at an estimate and pick out a non-OEM part or a non -- an omitted repair off the I-CAR listing, okay?

MR. WALDECK: Right.

THE COURT: Okay, so is that what you're proposing, that we -- two things, one, we get as many estimates as we can from American Family from the states included and from the class included and then have Mr. DeRungs go down the estimates and say included, not included?

MR. WALDECK: Two ways to do this and it's a clerical function and I should have argued this so we'd understand it. We propose a method and it says, for example, it says just as we proposed, that the preliminary analysis can be made by Mr. DeRungs because he knows how to go about it.

But, as David knows, you can step right in and say, "Your Honor, we want to be able to audit those findings and we want to be able to throw out people that we think DeRungs is

wrong about. And, that happens whether we're talking about toasters or stock certificates.

So, that's the mechanics of it and that's why I say that that's regularly how it's done. So, if they believe that the class, as put together, is wrong or if they believe our mailing list is wrong, they can challenge all of those things and it's, as I say, an audit function.

THE COURT: Okay. How are we going to get the information from Mr. DeRung if they only keep estimates for 90 days or less?

MR. WALDECK: Well, what we have to first start with is, is determine how they are, because we believe it's substantially longer than that based on what witness Canney said. But, if we don't -- if we only have it for a period of time, we have to go back to the ADP warehouse and repository is -- I don't know what the correct term for it is, where they keep it, see how far that takes us, and then from there determine what further steps have to be made.

MR. PINTAR: Yeah, Your Honor, maybe I can clarify some of this, because some of the information is clearly kept on computer. And, obviously that's very helpful for determining, making that determination. Beyond that, they have it on hard copy -- they have literally the hard copy estimate. And, so together, you have it on computer, you have it on hard copy. To the extent they have it on hard copy, that information can be downloaded into a database and that's put on a computer so that determination can be made.

THE COURT: Okay, just -- just a minute, Nick. Did you pick May 11th of 1990 because it was ten years?

MR. PINTAR: Yes.

• • •

[COURT HELD IN RECESS]

APPENDIX I

IN THE SUPREME COURT OF MISSOURI

No. 086864

STATE OF MISSOURI, ex rel.
AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Relator,

vs.

THE HONORABLE EDITH L. MESSINA,
JUDGE OF THE 16TH JUDICIAL CIRCUIT,
JACKSON COUNTY, MISSOURI,

Respondent.

SUGGESTIONS IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR, IN THE ALTERNATIVE, WRIT OF MANDAMUS

• • •

STATEMENT OF THE ISSUES

1. May a Missouri circuit court knowingly order the sending of a Rule 52.08(c)(2) individual notice of a class action lawsuit to tens of thousands of Missouri residents who are not members of the class and have no justiciable claims? If the answer is "yes,' is that order contrary to the due process clause of the United States Constitution?

• • •

III. THERE ARE OTHER MATERIAL PROBLEMS WITH THE FORM OF CLASS NOTICE ORDERED BY THE CIRCUIT COURT.

• • •

Plaintiffs have been willing to exclude from the notice mailing list only those American Family customers in Missouri who submitted "total loss" claims or "glass only" claims that could be excluded from the list electronically, without reviewing actual repair estimates. This means that many tens of thousands of American Family customers, who are not in the class and would have been identified as non-class members when the Missouri repair estimates were examined, are now targeted to receive direct individual notice in the case.

This is error. The court does not have the discretion to excuse plaintiffs from doing the things necessary to identify absent class members with reasonable certainty. As representatives of a plaintiff class, plaintiffs' counsel are obligated to perform and pay for the tasks necessary to identify absent class members and provide them with individual notice. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 356-60 (1978); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173-75 (1974); In re Nissan Motor Corp. Antitrust Litigation, 552 F. 2d 1088, 1096-1100 (5th Cir. 1977). In Eisen, the United States Supreme Court noted that individual notice to all class members in Rule 23(b)(3) cases, like this one, who can be identified through reasonable effort, is a fundamental requisite of the constitutional guarantee of procedural due process. Eisen, 417 U.S. at 173. Moreover, notice is not to be tailored to fit the pocketbooks of particular

plaintiffs. The reasonable effort requirement for a large class action requires a large effort at individual notice. Nissan, 552 F. 2d at 1096.

While it may be time consuming for plaintiffs to examine American Family's copies of the actual repair estimates in order to identify actual class members and cull out non-class members, the time and expense are not unreasonable. Moreover, requiring plaintiffs to do the work of physically examining the estimates is nothing more than holding them to the promise they made the circuit court when they were urging class certification.

The following exchange exemplifies plaintiffs' representations to the court at the class certification hearing regarding the process of identifying class members:

> **The Court [Judge Clark]:** Okay, so is that what you're proposing, that . . . we get as many estimates as we can from American Family . . . and then have Mr. DeRungs [plaintiffs' expert] go down the estimates and say included, not included?
>
> **Mr. Waldeck [plaintiffs' counsel]:** We propose a method . . . that the preliminary analysis can be made by Mr. DeRungs because he knows how to go about it . . . If they [American Family] believe the class, as put together, is wrong or if they believe our mailing list is wrong, they can challenge all of those things and it's, as I say, an audit function.
>
> **Mr. Pintar [plaintiffs' counsel]:** Yeah, Your Honor, maybe I can clarify some of this, because some of the information is clearly kept on computer and, obviously that's very helpful for determining, making that

> determination. Beyond that, they have it on hard copy -- they have literally the hard copy estimate and, so together, you have it on computer, you have it on hard copy. To the extent they have it on hard copy, that information can be downloaded into a data base and that's put on a computer so that determination can be made.

Exh. C: A29-31. [footnote omitted].

Earlier in the proceedings, plaintiffs told the circuit court that their expert could "absolutely" sort through the estimates and determine which ones have "omitted repairs" that were manually entered so that such claimants would not be included in the class. Exh. B: A25-26. Having achieved class certification, plaintiffs are not entitled to renege on their promises and cause the circuit court to send notice to Missouri claimants whose status as non-class members could clearly be established by the very review of the written estimates that plaintiffs previously promised to perform. [footnote omitted].

The problem of overinclusive notice is not limited to the omitted repairs prong of the case. The class definition specifically excludes from class membership those Missouri claimants who presented total losses. Some total loss claimants could be excluded from the claimant list electronically and that has been done. However, about 24,000 American Family customers who submitted total loss claims cannot be electronically excluded. That is because they elected to keep their damaged vehicles and therefore they were not sold for salvage by American Family. These owner-kept total loss claimants remain on the final notice mailing list even though: (1) they are not members of the class by definition; (2) they can be removed by examining the claim files; and (3) the court's order of August 13, 2004 expressly directs the names of total loss claimants to be

removed from the mailing list before notice issued. Exh. S: A237.

Beyond the 24,000 or so owner-kept total loss claimants, there is another substantial group of vehicle repair claimants poised to receive notice who have no justiciable claim. This group, about 25% of the Missouri claimants, is comprised of those policyholders whose claims were paid based on estimates prepared by independent body shops, not by American Family. Exh. U: A257. Certainly, as to these claimants, who were paid all they requested (less policy deductibles), it cannot be said that American Family systematically used a software estimating system to exclude certain needed repairs or to specify aftermarket parts. [footnote omitted]. These claimants should not receive class notice because they have no justiciable claim. Yet, notice is poised to be sent to them.

B. Over-Inclusive Notice is Harmful to Class Members and to American Family.

Under both federal and Missouri law, class notice is objectionable if it is over-inclusive, either by including people who are not in the class or by including people who clearly have no justiciable claims. Notice that invites persons who have no claim to participate in the lawsuit confuses and inconveniences non-class member notice recipients. Both the federal rule and the Missouri rule require notice to class members; they do not sanction notice to everyone. See FRCP 23(c)(2) and MRCP 52.08(c)(2); In re Agent Orange Product Liability Litigation, 818 F. 2d 145 (2nd Cir. 1987) (rejecting a request that notice be sent to every individual on a list when it was clear that not all were class members); Carlough v. Amchem Prod., Inc., 158 F.R.D. 314, 317 (E.D. Pa. 1993); Ex parte Central Bank of the South, 675 S. 2d 403, 407 (Ala. 1996) (overturning a trial

court order approving plaintiffs' request to send class notice to all purported class members even though many of them had no justiciable claim, stating "it will serve no legitimate interest to tell nearly 10,000 customers of the pendency of an action in which they -- under the theory of this case -- cannot participate.")

As for the effect of class notice on commercial defendants, courts recognize that notice carries with it the inescapable connotation of wrongdoing and jeopardizes the goodwill and trust of customers before there is any determination of actual wrongdoing or liability. Katz v. Cart Blanche Corp., 496 F. 2d 747, 761-62 (3rd Cir. 1974) cert. den., 419 U.S. 885; Colwell Co. v. Superior Court of CA, 123 Cal. Rptr. 228 (Cal. App. 1975). This is American Family's plight. Its customer relationships will be impaired by receipt of notice by many tens of thousands of Missouri policyholders who have no viable claim.

American Family's authorities establish that over-inclusive notice is improper. Plaintiffs largely ignore those authorities and instead rely on Macarz v. Transword Sys., Inc., 201 F.R.D. 54 (D. Conn. 2001), twice, for the proposition that it is perfectly acceptable to have as many as 25% of the recipients of the class notice be persons who are not members of the class. That is exactly the opposite of what Marcarz held. In that case, the court held that "sending notice to the admittedly over-inclusive group here would 'most likely confuse the recipients and encourage [responses] by non-class members.'" Marcarz, 201 F.R.D. at 64 (quoting In re Domestic Air Transp. Antitrust Litig., 141 F.R.D. 534, 546 (N.D. Ga. 1992)); see also Skelton v. Gen. Motors Corp., Nos. 79 C 1243, 80 C 2151, 1987 WL 6281, at *3 (N.D. Ill Feb. 5, 1987) (rejecting mailing to over-inclusive list where the notice "could mislead many thousands of ineligible

consumers into thinking that they qualify to recover in this action").

• • •

CONCLUSION

This Court is familiar with the applicable writ standards. "Prohibition will lie where there is an important question of law decided erroneously that would otherwise escape review by this Court, and the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision." State ex rel. Chassaing v. Mummert, 887 S.W.2d 573, 577 (Mo. banc 1994). Prohibition is available in the class action context, a fact reaffirmed just last year in State ex rel. Union Planters Bank v. Kendrick, 142 S.W. 2d 729 (Mo. banc 2004). Missouri law sanctions a writ of prohibition to avoid "useless suits" and to grant relief at the earliest possible time in the course of a lawsuit. State ex rel. Hamilton v. Dalton, 652 S.W.2d 237, 239 (Mo. App. 1983).

Missouri law also sanctions a writ of mandamus in class action proceedings, particularly to address problems of inadequate class notice. State ex rel. Byrd v. Chadwick, 956 S.W. 2d 369, 385-86 (Mo. App. 1997). Mandamus issues where a trial court has refused to act where it has a duty to act, such as in failing to give proper notice to potential class members. Id. at 376.

Plaintiffs' aftermarket parts claim runs afoul of Missouri law and must be dismissed. Accordingly, American Family Mutual Insurance Company respectfully urges the Court to issue a writ of prohibition, preventing plaintiffs from proceeding with their aftermarket parts claim. It is infinitely

better to dismiss it now by issuing a writ of prohibition, than to force the parties through an expensive trial of a legally defective claim before appellate review is available.

In addition, the court should issue a writ to prevent the circuit court from proceeding with the defective class notice it erroneously approved. The notice contains significant misinformation, omits key facts notice recipients need to know, and jeopardizes American Family's due process rights. Compounding those problems, the notice is poised to be sent to tens of thousands of American Family's customers who are not members of the class. A writ should issue to avert the irreparable damage the existing notice is sure to create.

Dated: May 26, 2005.

BERKOWITZ OLIVER WILLIAMS
SHAW & EISENBRANDT LLP

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ATTORNEYS FOR DEFENDANT AMERICAN FAMILY MUTUAL INSURANCE COMPANY

APPENDIX J

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

[Case No. WD 65420]

STATE OF MISSOURI, ex rel.
AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Relator,

v.

THE HONORABLE EDITH L. MESSINA,
Judge of the 16th Judicial Circuit,
Jackson County, Missouri,

Respondent.

PETITION FOR WRIT OF PROHIBITION OR, IN THE ALTERNATIVE, FOR WRIT OF MANDAMUS

I. INTRODUCTION.

American Family Mutual Insurance Company ("American Family") submits this Petition pursuant to Rules 94 and 97 of the Missouri Rules of Civil Procedure ("MRCP"), seeking a writ of prohibition or in the alternative a writ of mandamus in connection with a series of orders entered by The Honorable Edith L. Messina ("Judge Messina") in a class action lawsuit filed in Jackson County Circuit Court, captioned Nicholas Smith, Amy Johnson and Bryce Johnson, on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, v. American Family Mutual Insurance Company, Defendant, Case No. 00-CV-211554. The challenged orders

were entered on February 26, 2004, August 13, 2004, February 24, 2005, and March 28, 2005.[footnote omitted]. Copies of the challenged orders are attached as Exhibits O:A203-204; S:A237-249; X:A272-273; AA:A296-305. These orders decline to construe a Missouri administrative rule and decide notice issues in this class action lawsuit, and direct notice to many tens of thousands of Missourians who are not members of the class and have no viable claims.

II. THE RELIEF SOUGHT.

American Family seeks a writ of prohibition or mandamus requiring Judge Messina:

A. to refrain from approving the sending of a Rule 58.08(c)(2) individual notice of a class action lawsuit to tens of thousands of Missouri residents who are not members of the class and who have no justiciable claims;

• • •

III. STATEMENT OF THE REASONS WHY THE WRIT SHOULD ISSUE.

1. By this original action, American Family invokes this Court's writ powers for two primary reasons: (a) to resolve significant constitutional and legal issues of class notice that will evade appellate review if they are not considered at this time; and (b) to resolve by a single legal ruling the construction of a statute and administrative rule, in order to prevent over one hundred thousand Missouri citizens from becoming embroiled in class action litigation that may be premised on an invalid theory.

A. By orders dated August 13, 2004, February 24, 2005, and March 28, 2005, the circuit court directed individual

notice of this class action to be sent by mail to all American Family policyholders who submitted claims for repairs to their insured vehicles, except those policyholders whose claims were for total losses or glass repair only. By its orders, the circuit court intentionally ordered individual notice to be sent to many tens of thousands of American Family policyholders who are not members of the class or clearly have no justiciable claim. The court did this despite the plaintiffs' refusal since 2002 to honor their promise to identify and exclude non-class members from the list of those to receive notice.

B. The orders are invalid in that: (1) they directly violate MRCP 52.08(c)(2); (2) they violate the due process rights of both American Family and the policyholders by judicially authorizing policyowners who are not members of the class to become litigants and participate in a case in which they have no justiciable claim; (3) they violate the due process rights of both American Family and the policyholders by providing erroneous legal advice to putative class members regarding the res judicata effect of this litigation; and (4) they violate American Family's due process rights by interfering with its contractual relationship with policyholders who are non-class members but who will, under the circuit court's orders, receive notice nonetheless.

* * *

V. THE CIRCUIT COURT'S ORDERS FOR NOTICE TO THE CLASS VIOLATE THE UNITED STATES CONSTITUTION AND MRCP RULE 52.08.

24. This case is proceeding as a single class action with two class claims, the aftermarket parts claim and the omitted repairs claim. Over American Family's strong objection, the

notice approved by the circuit court is worded so its more than 450,000 recipients will not know whether they are members of the class or which of the two class claims, if either, applies to them[.]

25. The insureds receiving individual notice under Rule 52.08(c)(2) must be those class members who "can be identified through a reasonable effort." The circuit court failed to require the plaintiffs to exert "a reasonable effort" to identify the actual class members and cull out non-class members before notice issues.

26. The August 13, 2004 Order for Notice requires that notice be individually addressed by direct mail to all policyholder claimants except those with total loss claims and glass claims, despite the fact that the great majority of claimants receive repair estimates that did not specify a single non-OEM part. Only about 20% of American Family repair estimates specified the use of an aftermarket crash part. Exh. N, ¶ 11:A201.

27. American Family cannot electronically identify (and eliminate from notice) about 24,000 owner-kept total loss claimants, but the plaintiffs could identify and eliminate the names of all those claimants by examining American Family's hard copy claim files. Since at least 2003, American Family has offered plaintiffs the opportunity to examine the hard copy claim files, but they have declined. Exh. W, ¶¶ 7-13, 24e:A264-265, 267; Exh. T, ¶¶ 2-4:A250-253; Exh. Q, ¶ 11:A210; Exh. R:229-230; Exh. Z:A287-288.

28. Class notice is a judicial document and its contents and audience are issues of constitutional significance.

29. The class notice authorized by the circuit court is poised to be sent to about 24,000 American Family policyholders with total loss claims even though these claimants are not part of the class by definition. Their names can be culled from the notice list if plaintiffs examine American Family's hard copy claim files, something the court refuses to require.

30. Plaintiffs propose to provide notice by mail to the last known address of each claimant listed on the last CD produced by American Family even though that list is substantially overinclusive. A substantial number of claims, as high as 25%, were paid by American Family based on estimates obtained by insureds from independent body shops. In short, the estimates came from the insureds, not from American Family. The great majority of these insureds received the entire amount of their claims minus only the applicable deductibles. Exh. U:A256-258. These policyholders have no claims or justiciable interest in this lawsuit and they should not receive notice. They can be excluded from notice if plaintiffs simply examine the individual claim files American Family has made available to them.

31. The last CD American Family provided also includes policyholders who made some 45,449 "Qwik Pay" claims. These are small claims, each under $2,500, paid by the insurance agent at an insured's request based on independent body shop estimates neither written by nor adjusted downward by any American Family adjuster. Exh. V, ¶¶ 3-5:A259-260; Exh. W, ¶ 19:A266; Exh. T:A252. These claims do not involve the use of the American Family software that plaintiffs have alleged "systematically" specifies use of aftermarket parts and "systematically" excludes certain "omitted repairs." Thus, these Qwik Pay

claimants are not members of the class, but they are slated to receive notice nonetheless. This is particularly troubling because Qwik Pay claimants could be electronically eliminated from the list of those to receive notice, if only the circuit court ordered it.

32. At the class certification hearing in late October 2001, the plaintiffs specifically promised the circuit court, the Honorable Thomas Clark then presiding, that their expert would examine repair estimates to cull out those policyholders whose estimates did not really implicate any "omitted repairs" or had such repairs manually added to the estimate. Exh. B:A25-27; Exh. C:A29-31; Exh. D, ¶¶ 10-11:A33. For more than three years, plaintiffs have refused to honor that promise. The result is that the notice authorized by the circuit court will knowingly include insureds who are not members of the class and clearly have no claim.

33. By directing that specifically identifiable persons who have no justiciable claim be given notice of this class action, the circuit court violates MCRP Rule 52.08 and the due process clause of the Fourteenth Amendment to the United States Constitution for these reasons:

(a) The circuit court's order of August 13, 2004 specifically requires that notice not be sent to total loss claimants.

(b) MRCP Rule 52.08(c)(2) requires that the court "shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who cannot be identified through reasonable effort." The rule does not permit the court knowingly to direct individual notice to persons who are not

members of the class and whose status as non-class members can be reasonably ascertained.

(c) Individual notice knowingly directed to policyholders who are not members of the class disparages American Family's business and impairs its right to contract with Missouri car owners and operators.

(d) When notice is sent to an overbroad group of claimants, American Family is put in the untenable position of defending claims that are not justiciable. Due process for American Family and Missouri insureds requires more. It requires plaintiffs to expend the time and effort necessary to cull non-class members from the list of those to receive notice, even if the time required to accomplish the task is substantial.

34. In summary, the circuit court has directed individual notice by first class mail:

(a) To about 24,000 insureds who sustained total losses and who by the court's own order are not members of the class;

• • •

WHEREFORE, for all these reasons, the Court should stay further proceedings in this case and issue a preliminary and permanent writ of prohibition or mandamus providing that:

1. Respondent Messina shall not authorize the sending of individual notice to those American Family claimants who do not fit the class definition or have no justiciable claim;

2. Respondent Messina shall not authorize a form of notice that contains erroneous legal advice about the res judicata consequences of failing to opt out of the class;

3. Respondent Messina shall require the plaintiffs to exert the reasonable effort necessary to identify and send notice only to actual class members; and

4. Respondent Messina shall not authorize the sending of individual notice about a class action claim that is contrary to and cannot co-exist with Missouri law.

Dated at Kansas City, Missouri this 6th day of May, 2005.

Respectfully submitted,

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ATTORNEYS FOR RELATOR

APPENDIX K

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

Case No. 00-CV-211554
Division No. 12

NICHOLAS H. SMITH and
AMY and BRYCE JOHNSON,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

vs.

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Defendant.

AMERICAN FAMILY'S SUPPLEMENTAL RESPONSE REGARDING NOTICE ISSUES PURSUANT TO THE COURT'S TELEPHONE CONFERENCE ON FEBRUARY 17, 2005

On February 17, 2005, the Court held a telephone conference on the motions filed by American Family dated October 21, 2004 and dated November 5, 2004. The Court decided that the defendant's affirmative defenses, particularly defense 11, were overly argumentative and gave American Family until February 25, 2005 to make them less argumentative.

1. Attached hereto is a statement of American Family's defenses revised to conform to the Court's comments during the February 17 conference. They are submitted without waiver of the defenses previously submitted.

2. During the February 17 conference, the Court decided that class notice would be sent to a list of claimants that included an estimated 20,000 to 25,000 American Family insureds who were owner-retained "total loss" claimants. In doing so, the Court stated as follows:

> THE COURT: Well, let me tell you, I the we have looked at this, actually, and the notice can go out as proposed in that regard. Unless the insurance company wants to go back and ferret people out themselves, I it I don't know what else the plaintiffs can do. To have to go through 7,000 hours of looking at the files does not seem reasonable.

Tr. 15-16. American Family will accept the Court's suggestion that it go through the loss estimates itself to cull out these non-class members before class notice is mailed.

It would be very detrimental to American Family and to class members if class notice were to be sent to almost 25,000 customers who, without dispute, are not members of the class. Class notice carries with it the inescapable connotation of wrongdoing and jeopardizes the goodwill and trust of customers before there is any determination of wrongdoing or liability. Notice then becomes a club to force a defendant into submission rather than a reasonable attempt to notify absent class members of pending litigation.

Starting in the fall of 2003 and culminating at plaintiffs' depositions of American Family employees in December of

2003, the company consistently advised the plaintiffs that certain total loss claimants could not be electronically identified. This Court's Order of August 13, 2004 required the plaintiffs to exclude total loss claimants from their direct mail obligation. By letter dated September 10, 2004 (copy attached), the plaintiffs again refused to spend the funds necessary for ADP to do a computer search for total loss claims and the plaintiffs declined to do a file review. Instead, plaintiffs erroneously argued that American Family could electronically eliminate owner-retained total losses through its own computer system. That is not possible; therefore, American Family filed its motion of November 5, 2004. The plaintiffs agree that owner-retained total losses cannot be electronically eliminated using American Family's computer system, and they have known that since December of 2003 and at least since November 5, 2004. Rather than using the ensuing months to search the records or paying ADP to reduce the effort, the plaintiffs chose to request this Court to alter class action law to permit notice to customers who are not members of the class. Since the Court has now done so, American Family has no choice but to protect its business interests and the interests of its insureds.

American Family reserves its right to charge back to plaintiffs and class counsel the expenses incurred by the company to identify the owner-kept "total loss" claimants.

The Court may wish to consider this response prior to our telephone conference now scheduled for March 24, 2005 since we do not wish to commence that effort if the notice will go out in any event.

3. American Family has requested a Disk 4 to include names and addresses of claimants to and including December

1, 2004. The company could easily complete Disk 4 by March 24 if it is not necessary to include the most recent address of early claimants. The most recent address for insureds who filed a claim between May 11, 1990 and December 14, 2001 has not been upgraded since October of 2003. We assume the Court wants the most recent address for each claimant, but that is a complicated effort involving different divisions within the company. We anticipate that effort can be accomplished by approximately April 15, 2005.

4. There remains the issue with respect to the time allowed between the mailing of notice and the closing of the opt-out period. American Family suggests 90 days. That is, American Family suggests that any insured may opt out of the class within 90 days of the date of the first mailing and that plaintiffs have an obligation to re-mail notice to insureds when there has been a return because of change of address or other circumstances. Since this case goes back to 1990, it is inevitable that a large number of the first-class mailings will be returned because of changes of address or inability to deliver the notice and plaintiffs will have to re-send to a correct address. Ninety days is a minimal time to accomplish that result and allow the insureds time to make an intelligent decision to either opt in or opt out.

Dated this 25th day of February, 2005.
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APPENDIX L

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

Case No. 00-CV-211554
Division No. 12

NICHOLAS H. SMITH, et al.,

Plaintiffs,

vs.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Defendant.

AMERICAN FAMILY'S MOTION AND SUGGESTIONS IN SUPPORT TO PRECLUDE THE USE OF DISK 3 FOR THE PURPOSE OF NOTICE IN THIS CASE

American Family Mutual Insurance Company, by its attorneys, Berkowitz Stanton Brandt Williams & Shaw LLP, moves the Court for an order directing that Disk 3 prepared by American Family shall not be used for purposes of attempting to give direct individual notice to class members under Rule 52.08(c)(2) of the Missouri Rules of Civil Procedure. In support of its motion, defendant makes the following suggestions in support:

1. Rule 52.08(3)(2) requires that "the court shall direct to the members of the class the best notice practicable under the

circumstances, including individual notice to all members who can be identified through a reasonable effort."

2. At the class certification hearing, counsel for the plaintiffs repeatedly and earnestly assured the Court that their expert, Gerald DeRungs, would personally examine the repair estimates and cull out those insureds who did not have "omitted repairs." See Munson Aff. (10/22/03), ¶¶ 7-17, Exs. A, B, C.

3. American Family has previously argued that an over-inclusive notice that knowingly includes insureds who are not members of the class will violate Rule 52.08(c)(2) and the Due Process Clause of the United States Constitution. See "Objections and Response of American Family to Plaintiffs' Amended Suggestions in Support of Proposed Forms of Notice and Initial Notice Plan," pp. 1-13 (10/03/03); Oliver Letter to Judge Messina (4/26/04), pp. 1-4. The use of Disk 3 for class notice purposes will be grossly over-inclusive for the following reasons:

a. During the class certification hearing, the plaintiffs admitted to the Court that the so-called "omitted repairs" were not a factor for all repair estimates, and they promised the Court they would examine either ele ctronically or by hard copy a ll repair estimates to determine, with American Family, if the so-called "omitted repairs" (a) were actually omitted, and (b) if omitted, were "necessary" to repair the vehicle to pre-loss condition. The plaintiffs now decline to examine the repair estimates, wanting instead to send class notice to all of the insureds on Disk 3, even though four out of five were not paid based on aftermarket parts and multiple thousands have no "omitted repairs" or no omitted repairs necessary to repair their vehicles to pre-loss condition. See

"Objections and Response of American Family to Plaintiffs' Amended Suggestions in Support of Proposed Forms of Notice and Initial Notice Plan," pp. 1-13 (10/3/03); American Family's Response to Plaintiffs' Motion to Show Cause, pp. 2-3 (10/22/03); Earl H. Munson Affidavit (10/22/03), ¶¶ 7-17; Oliver Letter to Judge Messina (4/26/04), pp. 1-4; Canney Aff. V, ¶¶ 8-10 (4/23/04).

b. The plaintiffs concede, as they must, that total loss claimants are not in the class and should not receive notice. Having received the pre-loss actual cash value of their vehicles, which is the very most they are entitled to under their policies, these insureds have no justiciable claim, which is why they are defined out of the class. See Oliver Letter to Judge Messina (4/26/04), pp. 1-2. As indicated by Jon Walters Affidavit II, there are approximately 24,000 claimants whose claims are described as "owner-kept" total losses, and those claimants cannot be identified by American Family or anyone else without examining individual claim files. Walters Aff. II, ¶ 24e (attached). This examination can be done the same time the parties are examining claim files for insureds with "omitted repairs" claims.

c. As established by the Affidavit of R. Marshall Moyer, there were a substantial number of claims paid by American Family (possibly as high as 25%) based on estimates obtained by insureds from independent body shops, including thousands of repair estimates written manually without the aid of loss estimation software. Moyer Aff., ¶¶ 4-7 (attached). These insureds do not belong in the class and should not receive class notice. The great majority of them have received the entire amount of their claims everything they requested less applicable deductibles. These insureds can be excluded from Disk 3 only by examining individual claim files, which the plaintiffs now refuse to do. This

examination can be done the same time the parties are examining claim files for insureds with "omitted repairs" claims.

d. American Family is able to identify 45,449 "Qwik Pay" claims which do not belong in this class action, since such claims are paid by the selling agent at the insured's request based on independent body shop estimates and are not approved or adjusted downward by American Family adjusters. Walters Aff. II, ¶ 19 (attached); Canney Aff. VI, ¶¶ 3-5 (attached). Nor are the payment amounts of "Qwik Pay" claims reduced because the body shop has specified OEM parts or included any of the so-called "omitted repairs." To date, the plaintiffs still insist that these insureds, who are included on Disk 3, all receive class notice.

4. The Court has ordered that notice be given to all claimants who filed claims (other than total loss claims) during the period December 14, 2001 to December 1, 2003, even though they are not in the class and despite the change by American Family from the ADP computer software to the Mitchell computer software during that time period. Canney Aff. VI, ¶¶ 6-7 (attached).

5. Only approximately one out of five of the more than 450,000 Missouri insureds on Disk 3 was reimbursed by American Family based on aftermarket parts, and a material percent of the 450,000 American Family believes well more than 50% was not paid from a repair estimate that actually omitted the so-called "omitted repairs." There are two distinct classes: the aftermarket parts class and the "omitted repairs" class. The plaintiffs' proposal to send a single joint notice to two distinct classes of American Family insureds violates the insureds' and American Family's Due

Process Clause rights under the United States Constitution as well as the requirements of Rule 52.08(3)(2).

a. The insureds receiving "individual notice" under Rule 52.08(3)(2) must be those insureds "who can be identified through a reasonable effort." Thus, a recipient of notice will conclude that she is a member of both classes or be confused as to whether she is a member of one class or the other (and she may be a member of neither). For example, an insured who received a quality aftermarket part and the generous American Family guarantee that accompanied it might well want to opt out of the lawsuit if she realized she was not a member of the "omitted repairs" class. An insured who is happy with her aftermarket part and the American Family guarantee and who does not have an omitted repairs claim is misled into staying in the case contrary to her Due Process rights and American Family's Due Process rights.

b. Further, for those relatively few insureds who were actually members of both classes, the notice procedure forces them to opt out of the entire class or participate in both claims whether they want to or not, again, in violation of both the insureds' and American Family's Due Process rights.

6. The Gramm-Leach-Bliley Act, 15 U.S.C. § 6801, et. seq. may preclude the parties and the Court from using names and addresses and non-public financial information about American Family insureds who are not in the class. See Union Planters Bank National Association v. Gavel, 2003 WL 1193671 (E.D. La., March 12, 2003) (reversed on other grounds, 369 F.3d 457). It is one thing for the Court to order disclosure of names and addresses as an exception to the Gramm-Leach-Bliley Act so as to give notice to actual

class members; it is quite another to order that information be publicized for insureds who are not members of the class.

7. Disk 3 is attached to Jon Walters Affidavit II in a sealed envelope marked as Exhibit L. A copy has not been provided to the plaintiffs. American Family respectfully requests that the Court order that Disk 3 may not be used for class notice purposes and that the Court not give it to plaintiffs.

WHEREFORE, defendant American Family Mutual Insurance Company moves the Court to preclude the use of Disk 3 for the purpose of notice in this case.

[November 5, 2004.]

Respectfully submitted,

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APPENDIX M

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

Case No. 00 CV 211554
Division No. 12

NICHOLAS SMITH and
AMY and BRYCE JOHNSON,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Defendant.

OBJECTIONS AND RESPONSE OF AMERICAN FAMILY TO PLAINTIFFS' AMENDED SUGGESTIONS IN SUPPORT OF PROPOSED FORMS OF NOTICE AND INITIAL NOTICE PLAN

INTRODUCTION

* *

American Family has serious concerns that Plaintiffs' proposed notices and notice procedures do not satisfy the requirements of Rule 52.08 of the Missouri Rules of Civil Procedure (MRCP) and, as a result, they violate the due

process rights of both American Family and the absent class members. More specifically, American Family's objections include the following:

1. The notice is overinclusive because Plaintiffs propose (a) to send it to American Family customers who are not members of the class or who do not have justiciable claims; (b) to send a highly prejudicial notice amounting to a court directive that insureds contact Plaintiffs' counsel through the internet website and an 800-phone number; and (c) to send the notice to individuals who "may be" class members, rather than solely to individuals who "are" class members.

* * *

4. The cost of providing notice is unfairly shifted to American Family under Plaintiffs' plan;

* * *

ARGUMENT

I. OBJECTION #1: THE PROPOSED NOTICE PLAN IS OVERINCLUSIVE.

A. Overinclusive Individual Notice.

Plaintiffs propose that individual notice be mailed not only to members of the class, but "to every American Family insured in Missouri who submitted a claim for vehicle repairs on or after May 11, 1990 through December 14, 2001 (the 'Class Period')." Plf. Amend. Sug. at 2. Under this proposal, notice would go to thousands of insureds, valued American Family customers, who are not members of the class. American Family would even have to pick up a major portion of Plaintiffs' notice expense, as Plaintiffs would require American Family to enclose the notice forms in its

customer mailings. Plf. Amend. Sug. at 7. This proposal tramples on the due process right of American Family and innocent notice recipients.

In Missouri, class notice is governed by MRCP 52.08(c)(2), interpretive Missouri case law and the Due Process Clause of the United States Constitution. MRCP 52.08(c)(2) is identical to Rule 23(c)(2) of the Federal Rules of Civil Procedure. Missouri courts look to federal decisions for guidance on class issues. See State ex rel. Byrd v. Chadwick, 956 S.W.2d 369, 378-79 (Mo. App. 1997). Class action rules are compulsory, not permissive. Beatty v. Metropolitan St. Louis Sewer Dist., 914 S.W.2d 791, 795 (Mo. 1996).

MRCP 52.08(c)(2) provides as follows:

> [T]he court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if requested by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if desire, enter an appearance through counsel.

(Emphasis added.)

Individual notice must be given to all reasonably identifiable class members. This requirement comes from FRCP 23(e)(2) and its Missouri counterpart, MRCP 52.08(c)(2), and from the Due Process Clause of the United States Constitution. See Eisen v. Carlisle & Jacquelin, 417

U.S. 156 (1974) (all 2,250,000 members of the class identifiable with reasonable effort must be given individual notice). The individual notice requirement was "designed to fulfill the requirement of due process to which the class notice procedure is of course subject." Id. at 173-74. "[I]t was intended to insure that the judgment, whether favorable or not, would bind all class members who did not request exclusion from the suit ..." Id. at 175. "There is nothing in [this rule] to suggest that the notice requirements can be tailored to fit the pocketbooks of the particular plaintiffs." Id. at 176.

The phrase "[c]lass members who can be identified through reasonable effort" does not mean "readily identifiable class members," as Plaintiffs say in their Amended Suggestions. (Plf. Amend. Sug. at 2 and 4.) Even though the chore of identifying absent class members may take substantial time and resources, and requires physical examination of voluminous hard copy records, it is required to satisfy the due process rights of absent class members. In Re Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088, 1096-1100 (5th Cir. 1977).

The district court's characterization of the undertaking here as "herculean" is accurate only in relation to the class's size. The key, though, is a reasonable effort, and a large class requires a large effort. [FRCP 23](c)(2) mandates that each class member be given the "best notice practicable under the circumstances." While the mechanical process of examining the cards may prove to be expensive and time-consuming, the individual right of absentee class members to due process makes the cost and effort reasonable. Accordingly, the district court's class notice is vacated, and the court is directed to require

> individual notice to the class based on the information available on the [1,700,000 record] cards.

Id. at 1100. That decision firmly established that "reasonable effort" is not measured by the time or the expense involved; rather "reasonable effort" is measured by the likelihood of identifying class members. This well-known and well-reasoned case has been cited favorably in Missouri on class notice issues. State ex rel. Byrd, supra, 956 S.W.2d at 385. Here, it is undisputed that the class members can only be identified by examination of American Family's claim files all of which have been preserved for the class period.

Class representatives cannot avoid the time and expense of identifying class members by proposing to mail class notice to a larger group of persons to which the actual class members belong. Like the class definition itself, class notice is objectionable if it is overinclusive. Class notice is overinclusive if the proposed notice recipients include persons who are not in the class or do not have justiciable claims. See, e.g., In re Agent Orange Prod. Liab. Litig., 818 F.2d 145 (2nd Cir. 1987) (rejecting a request that notice be sent to every individual on a list when it was clear that all were not class members); Carlough v. Amchem Prod., Inc., 158 F.R.D. 314, 317 (E.D. Pa. 1993) (rejecting as overinclusive a list of class notice recipients that included many non-class members); Collins v. International Dairy Queen, Inc., 169 F.R.D. 690, 692 (M.D. Ga. 1997) (rejecting plaintiff's request that notice be sent to class members who could not bring a claim against the defendant); Ex Parte Central Bank of the South, 675 So.2d 403, 407 (Ala. 1996) (overturning a trial court order approving plaintiff's request to send class notice to all purported class members even though many of them had no justiciable claim against the defendant and stating: "[I]t will serve no legitimate purpose

to tell nearly 10,000 [of the defendant's] customers of the pendency of an action in which they -- under the theory of this case -- *cannot participate.*") (underlining added, italics in original).

Class notice carries with it the inescapable connotation of wrongdoing and jeopardizes the goodwill and trust of customers before there is any determination of wrongdoing or liability. This unfortunate aspect of class notice is compounded when the list of proposed notice recipients includes customers who are not class members at all or, if class members, have no justiciable claim. Overinclusive notice can be prejudicial to recipients as well. Such notice is confusing and misleading at best, and has the potential for adverse preclusive effect on persons who themselves have no justiciable claim against the defendant. See State ex rel. American Family, supra, 106 S.W.3d at 496 (concurring opinion, Justice Wolff) (while the class definition sets the parameters of the class, it is the notice that secures the claim preclusive effect of the outcome of the case). In Missouri, as discussed below, that claim preclusive effect is quite broad.

* * *

Dated at Kansas City, Missouri this 3rd day of October, 2003.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT AMERICAN FAMILY MUTUAL INSURANCE COMPANY

[Attachments Omitted]

MOTION FILED

SEP 3 0 2005

(2)

No. 05-280

In The
Supreme Court of the United States

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Petitioner,

v.

EDITH L. MESSINA, Judge, 16th Judicial Circuit Court, Jackson County, Missouri,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Missouri

MOTION OF PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA FOR LEAVE TO FILE INSTANTER ITS BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

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MOTION OF PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA FOR LEAVE TO FILE INSTANTER ITS BRIEF *AMICUS CURIAE*

The Property Casualty Insurers Association of America respectfully requests leave to file instanter brief *amicus curiae*. Requests for consent to file this brief have been made to the parties, and as of the date of the filing of this motion, no response has been provided to this request. Neither party has expressly rejected this request.

The issue addressed by the Petition is of great importance to the Property Casualty Insurers Association of America and its more than 1,000 member insurance companies. The Property Casualty Insurers Association is the leading voices of the property, casualty and health insurance industries. The Property Casualty Insurers Association of America (hereinafter referred to as "PCI") represents virtually every type of insurance company in the United States. Members of the PCI conduct business, offer corporate and individual insurance products, investigate claims and issue insurance policies to millions of policyholders across the United States.

Companies of every size and type comprise the membership of PCI, from insurance companies that conduct business in limited geographic regions to large commercial enterprises that transact business from coast to coast. The PCI's member insurance companies insure people from all walks of life, including students, families, small business owners, laborers, farmers and professionals. Virtually every type of business or organization imaginable, from the neighborhood bakery to international corporations, rely on these insurers for their expertise in investigating

claims, mediating and settling disputes and providing a legal defense in trial and appellate courtrooms across the country. In addition to defending lawsuits filed against their policyholders, insurers are on occasion directly involved in litigation. In both circumstances, insurers have developed substantial experience in dealing with courts and litigation in state and federal courts across the nation. Collectively, the PCI membership has amassed significant experience addressing significant issues, including due process issues, in our nation's courts.

As a result of this daily interaction with our nation's courts, PCI member insurance companies know firsthand the impact that the judicial branch has on the insurance industry. The *Amicus Curiae* is troubled by the erroneous rulings made by the courts below in this case and of the potential impact these rulings may have on policyholders and their insurers in Missouri and across the nation. The *Amicus Curiae* believes that these rulings constitute a significant departure from prior cases decided by our nation's high court. Moreover, the *Amicus Curiae* is deeply concerned that the decisions by Missouri courts below in this case threaten to sweep aside fundamental constitutional due process protections afforded to the petitioner American Family Mutual Insurance Company and potentially to other future litigants in Missouri and across the country.

For the foregoing reasons, the Property Casualty Insurers Association of America respectfully requests that this Court grant this motion.

Respectfully submitted,

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*[1]

The *Amicus Curiae* Property Casualty Insurers Association of America is the leading voice of the property, casualty and health insurance industries. The Property Casualty Insurers Association of America (hereinafter referred to as "PCI") represents virtually every type of insurance company in the United States. Members of the PCI conduct business, offer corporate and individual insurance products, investigate claims and issue insurance policies to millions of policyholders across the United States.

Companies of every size and type comprise the membership of PCI, from insurance companies that conduct business in limited geographic regions to large commercial enterprises that transact business from coast to coast. The PCI's member insurance companies insure people from all walks of life, including students, families, small business owners, laborers, farmers and professionals. Virtually every type of business or organization imaginable, from the neighborhood bakery to international corporations, rely on these insurers for their expertise in investigating claims, mediating and settling disputes and providing a legal defense in trial and appellate courtrooms across the country. In addition to defending lawsuits filed against their policyholders, insurers are on occasion directly involved in litigation. In both circumstances, insurers have

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

developed substantial experience in dealing with courts and litigation in state and federal courts across the nation. Collectively, the PCI membership has amassed significant experience addressing significant issues, including due process issues, in our nation's courts.

As a result of this daily interaction with our nation's courts, PCI member insurance companies know firsthand the impact that the judicial branch has on the insurance industry. The *Amicus Curiae* is troubled by the erroneous rulings made by the courts below in this case and of the potential impact these rulings may have on policyholders and their insurers in Missouri and across the nation. The *Amicus Curiae* believes that these rulings constitute a significant departure from prior cases decided by our nation's high court. Moreover, the *Amicus Curiae* is deeply concerned that the decisions by Missouri courts below in this case threaten to sweep aside fundamental constitutional due process protections afforded to the petitioner American Family Mutual Insurance Company and potentially to other future litigants in Missouri and across the country.

ARGUMENT

I. Certiorari Should Be Granted In This Case Because The Missouri Courts' Decisions Below Violate The Due Process Clause Of The Fourteenth Amendment To The Constitution Of The United States.

Under the Missouri Rules of Civil Procedure relating to class actions, a trial court is required to "direct to the members of the class the best notice practicable under the

circumstances, including individual notice to all members who can be identified through reasonable effort." Mo. R. Civ. P. 52.08(c)(2). This language tracks the Federal Rules of Civil Procedure. Fed. R. Civ. P. 23(c)(2). The Missouri Rules of Civil Procedure clearly direct a trial court to include in a class only those persons that qualify as "members" of that class. Because of the unique nature of class action lawsuits, the highest degree of care should be employed by trial courts when certifying any class so as to ensure that the class is neither over nor under inclusive. The Missouri Rules of Civil Procedure mandate accuracy in both the identification of class members and in providing proper notice to class members as a safeguard of all the litigants' constitutional rights.

The Petitioner in the case at issue was not afforded the same due process protections afforded to all persons under Missouri law. The Petitioner's due process rights were clearly breached by the fact that the trial court below sanctioned the addition of some 24,000 additional class plaintiffs, despite the fact that these class plaintiffs did not have the same claims that class members were required to have. In fact, many of these additional 24,000 additional class plaintiffs did not have claims even remotely similar to the defined class.

The due process question presented by the Petitioner raises a serious constitutional issue that may occur over and over, in Missouri courts as well as in other courts across the country. The fact that the case below arose from rulings made under Missouri law does not necessarily mean that the due process issue is limited to Missouri trial courts or even to the State of Missouri. Due process protections that are afforded to litigants, and in particular procedural due process protections, are among the most

important protections afforded against whom a lawsuit is filed. The Constitution mandates that litigants be afforded their due process rights, and where a court fails to protect that most cherished right, such as in the Petitioner's situation in the case below, this Court's intervention is necessary. The due process issue raised by Petitioner has serious implications for the entire nation. This case presents an opportunity for this Court to not only protect the due process rights of the Petitioner, but also to define and clarify for state and federal courts across the country what the Constitution of the United States requires when a class is defined and certified.

The sheer magnitude alone of the due process violation in the instant case warrants this Court's review. The case at issue in the Petition does not involve a situation where a plaintiff was inadvertently erroneously added to a class due to error or oversight. To the contrary, in the case below, approximately 24,000 individuals were included as class plaintiffs at the direction of the trial court and were included as part of a class that they did not qualify to be included as a part of.

Petitioner American Family Mutual Insurance Company argued to the Circuit Court for Jackson County, Missouri Court of Appeals and Missouri Supreme Court that the trial court's order authorizing over-inclusive class notice to some 24,000 identifiable non-class members in an opt-out state class action violates American Family's due process rights under the Fourteenth Amendment of the United States Constitution. Specifically, on November 5, 2004, American Family filed a motion with the trial court, arguing that authorizing opt-out class notice to some 24,000 non-class members who have no justiciable claim against American Family violated "the Due Process Clause

of the United States Constitution." Pet. App. 16a. On February 24, 2005, the trial court denied American Family's motion. *Id.* at 37a-38a; *see also id.* at 5a-10a. On May 6, 2005, American Family petitioned the Missouri Court of Appeals for a writ of prohibition or mandamus, contending that the trial court's order allowing over-inclusive notice to some 24,000 identifiable non-class members who, everyone agrees, have no justiciable claim violated "the due process clause under the Fourteenth Amendment to the United States Constitution." *Id.* at 48a; *see also id.* at 45a-49a. On May 25, 2005, the Missouri Court of Appeals denied American Family's petition for writ of prohibition or mandamus. *Id.* at 52a; *State ex rel. American Family Mut. Ins. Co. v. Messina*, No. WD-65420 (Mo. Ct. App. May 12, 2004) (unpublished). On May 26, 2005, American Family petitioned the Missouri Supreme Court for a writ of prohibition or mandamus, arguing again that the trial court's actions as to over-inclusive notice violated "the due process clause of the U.S. Constitution." Pet. App. at 53a; *see also id.* at 53a-60a. On June 3, 2005, the Missouri Supreme Court denied American Family's petition for writ of prohibition or mandamus. *Id.* at 62a-63a; *State ex rel. American Family Mut. Ins. Co. v. Messina*, No. SC-86864 (Mo. June 3, 2005) (unpublished).

Section 1 of the Fourteenth Amendment provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Due Process Clause is "'intended to secure the individual from the arbitrary exercise of the powers of government'" *Hurtado v. California*, 110 U.S. 516, 527 (1884), *quoting Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819). *See, e.g., Wolff v. McDonnell*, 418

U.S. 539, 558 (1974). When government officials deliberately decide to deprive an individual of liberty or property, they "exercise . . . the powers of government" directly against the individual.

Throughout its history, the guarantee of due process of law has been directed to government actions that deliberately deprived individuals of life, liberty, or property. This Court has explained the derivation of the Due Process Clause as follows (*Twining v. New Jersey*, 211 U.S. 78, 100 (1908)):

> [T]he proposition universally accepted by American courts on the authority of Code, [is] that the words "due process of law" are equivalent in meaning to the words "law of the land," contained in that chapter of Magna Carta, which provides that "no freeman shall be taken, or imprisoned, . . . or outlawed, or exiled, or any wise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land."

This language from the Magna Carta obviously was designed to forestall oppression through deliberate acts of government.

As this prohibition has evolved, it has continued to refer to deliberate acts. The phrase "due process of law" has been traced to 28 Edw. 3, ch. 3, which provides:

> No man of what state or condition he be, shall be out of his lands or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without he be brought to answer by due process of law. Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366, 368 (1911). *See Ingraham v. Wright*, 430 U.S.

651, 673 n.41 (1977). The earliest state cases interpreting the phrase "due process of law" similarly were concerned with the procedures by which deprivations of liberty or property were deliberately imposed on individuals. *See, e.g., Zylstra v. Charleston*, 1 Bay 382, 384 (S.C. 1794) (fine imposed by court without jury); Corwin, 24 Harv. L. Rev. at 372-373.

Until recent decades, this Court's procedural due process cases generally concerned the procedures that were to be followed in criminal enforcement proceedings or in civil suits leading to the entry of judgment by a court. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1267-1268 (1975). More recently, the Court has specified the procedures that must be followed in other kinds of proceedings leading to a deprivation of liberty or property. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970); *Bell v. Burson*, 402 U.S. 535 (1971). *See generally Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430-431 (1982) and cases cited. In some instances, it has permitted process to be provided after the deprivation has occurred. *See, e.g., Ingraham*, 430 U.S. at 674-682; *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908). But while these "proceedings" often are informal – they might involve, for example, no more than a decision made by a single low-level government employee whose primary responsibility is not the adjudication of claims (*see, e.g., Ingraham; Goss v. Lopez*, 419 U.S. 565 (1975)) – the Court's rulings have applied the guarantee of procedural due process in the way envisioned at the time of the Magna Carta: to define the procedures the government must follow when its agents deliberately impose a loss of liberty or property on a person.

The Due Process Clause does not deny a state the right to deprive persons of property or liberty, so long as it provides due process prior to (or, in some situations, soon after) the deprivation. *See Carey v. Piphus*, 435 U.S. 247, 259 (1978). And the state, unless it acts in a wholly arbitrary way (*see Martinez v. California*, 444 U.S. 277, 282 (1980)), is responsible for setting the substantive criteria that, if met, will justify a deprivation. *See, e.g., Bell v. Burson*, 402 U.S. 535, 541 (1971); *Goss v. Lopez*, 419 U.S. 565, 573-574 (1975); *Hudson v. Palmer*, No. 82-1630 (July 3, 1984), slip op. 12-18; *See also id.* at 3 (O'Connor, J., concurring). *See generally Logan*, 455 U.S. at 433; *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 11-12 (1978).

The role of procedural due process in this regime historically has been to guarantee that a person threatened with (or suffering from) a deprivation receives an "opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1924). *See Mullane*, 339 U.S. at 313. This opportunity serves to forestall arbitrary state action and "minimize[s] substantively unfair or mistaken deprivations of life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests," *Carey*, 435 U.S. at 259-260, *quoting Fuentes v. Shevin*, 407 U.S. 67, 81 (1972); adequate process helps assure that the state will take into account the factors that it has deemed relevant to the deprivation. In the Petitioner's case, there is no means by which Petitioner can "be heard" on, or to defend, the fact that 24,000 class members now have been included in a class in which they should not have been included. There is no procedural mechanism in Missouri law that permits the Petitioner to argue to a jury or to the bench that specific members of the class either have no claim, or that their

claim is far different than the nature of the claims being tried in the case below. 24,000 persons were summarily swept into the pool and, in effect, camouflaged to blend in with persons who fell within the parameters of the defined class. The unconstitutional deprivation of Petitioner's due process rights occurred at the very moment the trial court ordered that the 24,000 additional class members be included in class and the underlying suit. The due process clause guarantees Petitioner the right to be heard and to have a claim of right fairly judged. The trial court's ruling denied Petitioner that right.

II. Certiorari Should Be Granted In This Case Because The Decisions Below Violate The Contracts Clause Of The Constitution Of The United States.

A. The Decisions Below In This Case Have Essentially Rewritten The Material Terms And Conditions Of American Family's Insurance Policies In Violation Of The U.S. Constitution's Guarantees Of Freedom To Contract.

This case involves the contractual rights of American Family Insurance policyholders. The rights of these policyholders is limited to the specific terms and conditions of their respective policies. The policy language governs American Family's duties and obligations to each policyholder.

The effect of the trial and appellate courts' rulings below, to include 24,000 persons in a class in which they did not qualify, was to redraft otherwise valid American Family insurance policies. Stated another way, policyholders who had no valid claim under their policies were

afforded the opportunity to bring and be made part of a lawsuit seeking damages, where the damages sought were not damages the 24,000 additional class members were entitled to based on their particular situations. This Court has for nearly a century prohibited any governmental act impairing the rights of persons, including corporations like the Petitioner, to contract in other states. This Court in 1911 in the case of *Walker v. Lovitt*, 250 Ill. 543, 549, 95 N.E.2d 631 (1911) clearly stated that persons enjoy a constitutional right to make contracts without interference from governmental bodies:

> If it is undertaken to invalidate legal contracts . . . the case is different. Such action would deny to the parties to the contract the equal protection of the laws and abridge their privileges as citizens of the United States, and deprive them, without due process of law, of the liberty of making contracts . . . in regard to their property . . . *Allgeyer v. State of Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832.

The ruling against the Petitioner by the trial and appellate courts below is inconsistent with the constitutional guarantees afforded to persons and corporations to enter into contracts freely and to be subject only to those terms and conditions that they contemplate and accept. The trial and appellate courts' decisions in this case have essentially rewritten the material terms and conditions of the Petitioner's insurance policies with their policyholders without the Petitioner's or the policyholders' consent. The rulings below extended greater benefits to the 24,000 additional class members that they otherwise would not have been entitled to. This unilateral alteration of this

contractual relationship violates the Constitution's guarantees of freedom to contract.

> Article I, section 10, of the United States Constitution provides that no state shall pass any bill or law that impairs the obligations of parties to contracts. U.S. CONST. art. I. *See also, Tidal Oil v. Flanagan*, 263 U.S. 444 (1924). Although no explicit constitutional language protects the sanctity of contract against federal legislation, this Court has held that the Due Process Clause in the Fifth Amendment contains essentially the same effect. *Lynch v. United States*, 292 U.S. 571 (1934) (invalidating Congressional attempts to cancel certain types of insurance policies). Both the federal and states' constitutions prohibit the enactment or enforcement of laws impairing the obligations of contracts. *Superior Motors, Inc. v. Winnebago Indus., Inc.*, 359 F.Supp. 773, 777 (D.S.C. 1973).

For nearly two centuries, the United States Supreme Court has routinely declared invalid governmental acts that substantially impair or affect the contractual rights of parties. *See generally, Fletcher v. Peck*, 10 U.S. 87 (1810); *College v. Woodward*, 17 U.S. 518 (1819); *New Jersey v. Wilson*, 11 U.S. 164 (1834); *Perry v. United States*, 294 U.S. 330 (1935).

Generally, any judicial or legislative act that attempts to make material alterations of the character, terms or legal effect of existing contracts is clearly void. 16A C.J.S. Constitutional Law, section 353 et seq. Of this character are legislative acts that attempt to add a material condition or provision to a contract and those which attempt to release stipulations therein. *Id.* It may be said that a legislative enactment impairs the obligations of a contract

when it attempts to take from a party a right that he is entitled to by its terms. *Superior Motors, Inc.*, 359 F.Supp. at 773. Thus, judicial action or legislation which attempts to make material alterations in the character, terms or legal effect of an existing contract impairs the obligations of that contract. *Id.* at 777. Furthermore, all judicial and legislative acts that impose added conditions or duties on parties to a contract are void if they produce a change in the obligations or substantial rights of the parties. *Id. See also*, 16A C.J.S. Constitutional Law, section 353 et seq. Other material alterations that would impair the obligations of contracts are those that alter the extent of liability under a contract or which empower courts to rewrite contractual agreements substantially. 16A C.J.S. Constitutional Law, section 353 et seq.

A basic and cherished principle in this nation is that the right of parties to structure contracts in accordance with their wishes and expectations is protected under our Constitution. *See generally, Hedge v. Evans Financial Corp.*, 707 F.2d 1566 (D.C.Cir. 1983). If the freedom to contract under the Constitution is to retain its true meaning, it must be understood that it does impose limitations upon the power of legislatures, and courts for that matter, to abridge existing contractual relationships. *See generally, Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978). This constitutional guarantee is not limited to individuals. Commercial parties are also afforded constitutional protections to enter into contracts freely and to accept only those terms and conditions that they desire to undertake. *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1001 (3rd Cir. 1980).

In the instant case, the trial and appellate courts below have essentially rewritten the material terms and

conditions of countless insurance policies without either the Petitioner's or the policyholders' consent. This unilateral alteration of this contractual relationship violates the Constitution's guarantees of freedom to contract. The Constitution clearly prohibits such an expansion of key contract provisions without the authorization and consent of the parties to that contract.

Here, the effect of the rulings by the trial and appellate courts are inconsistent with the constitutional guarantees afforded to persons and corporations to enter into contracts freely and to be subject only to those terms and conditions that they contemplate and accept. The trial and appellate courts' complete disregard of the existence of varying terms and conditions in various insurance policies eliminates Petitioner's right to contract to undertake certain specific risks. This unilateral alteration of this contractual relationship violates the Constitution's guarantees of freedom to contract.

Accordingly, for this reason alone, this Court should grant Petitioner's petition. Ultimately, the *amicus curiae* believes that this Court should reverse the decisions below and enter judgment in favor of Petitioner so that the freedom to contract freely will continue to be upheld as one of the central freedoms afforded to the citizenry of Missouri.

B. Judicial And Governmental Alterations Of Private Contracts Are Permitted Only In Limited And Exceptional Circumstances, None Of Which Are Present Here.

The *Amici Curiae* acknowledge the right to freely contract is not absolute. There are certain limited and

exception circumstances where a legislature or court may alter private contracts and such alterations will withstand constitutional challenge.

The first exceptional circumstance where a private contract's terms and conditions may be altered is where the parties to the contract affected by the modification give their consent to such alteration. *See generally*, 16A C.J.S. § 344. In the instant case, there are no facts that suggest Petitioner or its policyholders consented to the wholesale modifications to the policies effectuated by the trial and appellate courts. Clearly, the "consent" exception is inapplicable here.

During periods of emergency, alterations are sometimes authorized and held not unconstitutional as an impairment of the contractual obligation. *See generally*, 16A C.J.S. § 344. Again, the record contains no evidence that any pressing emergency warranted any narrowing of Petitioner's policies at issue in this case. In the absence of any such exigent circumstances, the "emergency" exception clearly did not apply so as to constitutionally justify the trial and appellate courts' rulings in this case.

Private contracts may also be altered where the interests of the public welfare are at stake. Again, the record is completely devoid of any allegation that the trial and appellate courts' rulings were based on the interests of preserving and protecting the public interest and welfare. Accordingly the decisions of the trial and appellate courts must be vacated by this Court and Petitioner's right to protect its contractual terms and conditions must be reinstated. Otherwise, if the decisions of the courts below are permitted to stand, a mixed message will be sent to Missouri courts and courts across the country about how far a legislature, or a court for that matter, may go to re-write an otherwise

unambiguous private insurance contract. Furthermore, individuals and corporations in Missouri and across the nation will be forced to enter into private contracts with a significant degree of uncertainty as to whether their duties and obligations under their contracts will be changed without warning at some point by a legislature or court.

CONCLUSION

For the foregoing reasons, the Property Casualty Insurers Association of America respectfully requests that Petitioner's Petition for Writ of Certiorari be granted.

Respectfully submitted,

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